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The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of the countries of Eurasia. It covers recent legal developments in this region, but also those on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from government authorities.

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Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

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Citations in footnotes must conform to *The Bluebook: A Uniform System of Citation*. A References section is required: entries must conform to the author-title system, such as that described in the *Oxford Style Manual*.

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ARTICLES

COLLECTIVE LABOR DISPUTES AND STRIKES IN RUSSIA: THE IMPACT OF JUDICIAL PRECEDENTS AND ENFORCEMENT

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The right to strike is recognized in the Constitution and the Labor Code of the Russian Federation as a means to resolve collective labor disputes. However, in Russia labor protests come up for discussion much more frequently than strikes. In recent years the number of labor protests in Russia, including various forms of work stoppage, has increased significantly compared to previous years, but the number of legally constituted collective labor disputes and strikes has remained very low. The legislation on resolution of collective labor disputes and mounting strikes is quite restrictive in Russia, and its enforcement also encourages employees to seek alternative ways to settle collective labor conflicts. There is little empirical research on the judicial implementation of these norms and its influence on the enforcement of legislation. Therefore, this paper analyses the reasoning of courts in cases on the legality of strikes, their interpretations of the law, and the impact these decisions have on the enforcement of the legislation on resolution of collective labor disputes and strikes. Our conclusion is that the courts act as another restrictive influence on the resolution of collective labor disputes and the exercise of the right to strike in Russia.

Keywords: collective labor disputes; strikes; judicial precedent; enforcement; Russian labor law; labor protests.

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Introduction

Strikes have always been the most effective method in the struggle for workers' rights. The right to strike has been widely recognized in the 20th century. It has been proclaimed in a series of international agreements and national constitutions and regulated in legislation. It is guaranteed by the International Covenant on Economic, Social and Cultural Rights of December 16, 1966 and the European Social Charter (ESC) of 1996.[1] The right to strike follows from Art. 3 of ILO Convention No. 87 according to which organizations of workers and employers have the right to independently organize their activities and determine their programs of action. The ILO has elaborated an imposing collection of guidance on freedom of association

[1] Ratified by the Russian Federation with Federal law from July 3, 2009 No. 101-FZ "On the Ratification of the European Social Charter (Revised) from May 3, 1996" [Ратифицирована Российской Федерацией Федеральным законом от 3 июня 2009 г. № 101-ФЗ "О ратификации Европейской социальной хартии (пересмотренной) от 3 мая 1996 г."] (Apr. 17, 2017), available at www.consultant.ru.

including the right to strike. The ILO Committee on Freedom of Association (CFA) and the Council of Experts on the Application of Conventions and Recommendations (CE) have taken the lead in this process together with the tripartite Conference Committee on the Application of Standards (Conference Committee). What came out of these oversight bodies of the ILO has been called the "liberal interpretation of freedom of association."[2]

A proclamation of the right to strike appears in the constitutions of 95 governments that are members of the ILO, including the Russian Federation. More than 150 countries regulate strikes in their national legislation (laws on labor, employment, government service, the criminal code, etc.), and about 50 countries have enacted specific laws on the topic (pertaining to strikes, "essential services" and the like) or have acknowledged in their practice the right to strike.[3]

In 2012 this approach was challenged during the International Labor Conference when the Employers' Group took exception to the right to strike and refused to discuss a list of 25 countries that had infringed conventions these countries had ratified. The Group alleged that the right to strike was not directly proclaimed in Convention No. 87 and that the CE had exceeded its authority by interpreting the Convention.[4] Despite this effort to settle this controversy,[5] no final decision has been made. However, the inception of this kind of discussion has in itself had a negative impact on legislation and enforcement surrounding the right to strike.[6] It has been observed that the right to strike is being infringed in one way or another by 117 governments that submit regular reports to the ILO. In just the past five years 89 governments have enacted measures that weaken legislation or practices in this area. Restrictions of the right to strike in the last five years have come about through limiting the categories of workers

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[2] Teri L. Caraway, *Freedom of Association: Battering Ram or Trojan Horse?*, 13(2) Review of International Political Economy 210 (2006).

[3] Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, February 23–25, 2015) (ILO, Geneva, 2015) (Nov. 11, 2016), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_344248.pdf.

[4] Provisional Record No. 19 (Rev.), Part One, ILC, 101st Session, Geneva, 2012, at 48–49, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_183031.pdf. *Also see* Claudia Hofmann, (*The Right to) Strike and the International Labour Organization: Is the System for Monitoring Labour and Social Standards in Trouble?*, Friedrich-Ebert-Stiftung (2014) (Nov. 2, 2016), available at http://library.fes.de/pdf-files/iez/10775.pdf.

[5] Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, February 23–25, 2015), Outcome of the Meeting, at 2–4 (Nov. 4, 2017), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_346764.pdf.

[6] Edlira Xhafa, *The Right to Strike Struck Down?*, Friedrich-Ebert-Stiftung (2016) (Nov. 4, 2017), available at http://www.fes.de/cgi-bin/gbv.cgi?id=12827&ty=pdf.

that may exercise that right as well as by restricting the manner of organizing legally permitted strikes. Regardless of their degree of economic development of a country, both trends are observed.[7]

The right to strike in Russia is severely restricted. However, the tendency to limit the application and acknowledgment of the right to strike long predates the confrontation over it within the ILO.

Based on state statistics for strikes and collective labor disputes, there is a widespread opinion that these forms of protection of labor rights rarely happen in Russia. Legal academic specialists writing in Russian usually take these figures at face value and focus on analyzing the legislation and judicial practices that apply it only as they pertain to fulfillment of the law because the state statistics provide reassurance that the law is fair and effective. While critical analyses questioning the implementation of laws against strikes are put forward in some countries,[8] such analyses are absent in Russia. However, in practice the restrictive nature of Russian legislation on the resolution of collective labor disputes and strikes is persistently signaled, and issues have been raised in critical legal studies concerning the non-compliance of this legislation with international labor standards.[9]

This discrepancy between statistics and the actual level of conflict raises questions about the status of the implementation and enforcement of this legislation in practice. In particular the role of the courts in interpreting the legislation and enforcing compliance with it is of interest.

We find on the contrary that collective labor conflicts do occur often in Russia; but, because the legal mechanisms for resolving collective labor disputes and strikes are so seldom employed to settle them, most of these conflicts are not officially recognized as such. Existing practices in interpreting and implementing the legislation leave workers little hope of relying on them when a conflict arises. Workers and trade unions face negative attitudes and pressure from all levels of the state bodies that deal with collective labor protests, conflicts and strikes. Ever since legislation on strikes was enacted in Russia in 1995, the courts have also adopted an anti-strike stance.[10] Consequently, workers and trade unions seek ways to resolve collective labor

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[7] Xhafa, *supra* note 6, at 5.

[8] *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (B.A. Hepple at al. (eds.), Milano: Franco Angeli, 2015).

[9] Nikita Lyutov, *The Right to Strike: Russian Federation* in *The Right to Strike: A Comparative Overview* 451 (B. Waas (ed.), Alphen aan den Rijn: Kluwer Law International, 2014); Elena Gerasimova, *The Resolution of Collective Labour Disputes and the Realization of the Right to Strike in Russia* in *Labour Law in Russia: Recent Developments and New Challenges. Iss. 6* 259 (M. Tiraboschi et al. (eds.), Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2014).

[10] Павлов И.Н. Трудовые конфликты в организациях Конфедерации труда России: отношение работодателей, органов власти и общества к коллективным трудовым спорам (забастовкам) // Коллективные трудовые конфликты: Россия в глобальном контексте: Монография [Igor N. Pavlov, *Labor Conflicts in Organizations of the Confederation of Labor of Russia: The Attitude of Employers,*

conflicts that lie outside the burdensome provisions of the law. This explains why so few collective labor disputes are resolved by using the formal procedures and why extra-legal methods are used in so many cases to settle collective conflicts.

1. The Right to Strike in Russia

Regulation of strikes by law in modern Russia began with the enactment of the Law of the USSR of October 9, 1989 No. 580-I "On the Procedure for Resolving Collective Labor Disputes (Conflicts)." This was the first law in the history of the USSR and Russia to specifically address the settlement of collective labor disputes, the grounds for strikes, and the manner in which strikes are to be conducted. The law regarded strikes exclusively as a way to settle collective labor disputes (Art. 7) and regarded strikes as the means "of last resort."

Another important phase in the development of legislation on strikes was the adoption of the Constitution of the Russian Federation.[11] According to Art. 37, part 4 of the Constitution of the Russian Federation, the right to enter into individual and collective labor disputes is recognized when they employ the means for their settlement established by federal law, including the right to strike.

The Soviet law on collective labor disputes was replaced in 1995 by the Russian Federal law of November 23, 1995 No. 175-FZ "On the Manner of Resolving Collective Labor Disputes." As things now stand, matters pertaining to strikes are governed by the Labor Code of the Russian Federation (Labor Code) enacted at the close of 2001 and in force since February 1, 2002.[12] In contrast to the International Covenant on Economic, Social and Cultural Rights, the European Social Charter, and ILO standards – all of which recognize the right to strike in a broad range of circumstances – the concept of the right to strike is quite limited in Russia.

Among the grounds for a strike that are permissible in the judgment of the ILO oversight bodies are: to resolve issues in economic and social policy and also issues arising within enterprises that have a direct impact on the interests of workers;[13] to

Governmental Authorities, and Society toward Collective Labor Disputes (Strikes) in *Collective Labor Conflicts: Russia in the Global Context: Monograph*] (Yu.P. Orlovsky & E.S. Gerasimova (eds.), Moscow: Kontrakt, 2016).

11 Конституция Российской Федерации, принята всенародным голосованием 12 декабря 1993 г., Собрание законодательства РФ, 2014, № 31, ст. 4398 [Constitution of the Russian Federation enacted by the national referendum on December 12, 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

12 Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ, Собрание законодательства РФ, 2002, № 1 (ч. 1), ст. 3 [Labor Code of the Russian Federation No. 197-FZ of December 30, 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3].

13 *See* Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (ILO, Geneva, Fifth (revised) edition, 2006), paras. 526, 527 (Apr. 20, 2017), available at http://www.ilo.org/public/libdoc/ilo/2006/106B09_305_engl.pdf.

protest economic and social policies of the government (although purely political strikes are outside the scope of the principles of freedom of association);[14] to resolve labor disputes, including collective ones;[15] to express solidarity provided that the strike being supported is a lawful one;[16] to secure recognition of a trade union (including as one of the parties in collective bargaining);[17] to recover wages unpaid over many months;[18] and to protest the murder of trade union leaders and members.[19]

However, in Russia pursuant to Art. 398, part 4 of the Labor Code, a strike is a voluntary refusal by workers to carry out their assigned jobs (either partially or completely) in order to resolve a collective labor dispute. The norm in Art. 409, part 1 of the Labor Code is consistent with this definition. That norm stipulates that, in accordance with Art. 37 of the Constitution of the Russian Federation, the right to strike is recognized as a way to settle collective labor disputes.

Comparing these legal acts with the position of ILO bodies shows that the right to strike as it is recognized in the Russian Federation excludes strikes to express solidarity, strikes to protest the government's economic and political policies, strikes to achieve recognition of a trade union, strikes to resolve issues arising from economic and social policy, and strikes to resolve problems arising within an enterprise that directly affect worker interests.

The CFA has addressed comments to the Government of the Russian Federation stating that its legal definition of strikes as it pertains to the purposes for them does not conform to the ILO's norms.[20] To date, however, these comments have provoked no reaction.

The European Committee of Social Rights (ECSR) adheres to a similar interpretation of the right to strike with regard to Art. 6, para. 4 of the ESC.[21] The ECSR has mentioned[22] that:

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14 Freedom of Association, *supra* note 13, paras. 529, 531, 541, 542, 543.

15 *Id*. Paras. 484, 489.

16 *Id*. Para. 534.

17 *Id*. Paras. 535, 536.

18 *Id*. Para. 537.

19 *Id*. Para. 544.

20 333nd Report of the Committee on Freedom of Association on Case No. 2251, International Labour Office, Administrative Council, 289th session, Geneva (March 2004), para. 1001 (Apr. 20, 2017), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907631.

21 ECSR Conclusions IV, Germany, at 50, Conclusions XIX-3 (Germany) (2010), and Digest of the Case Law of the European Committee of Social Rights (2008), at 56 (Apr. 20, 2017), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f.

22 Digest of the Case Law, *supra* note 21, at 56.

> Article 6 § 4 applies to conflicts of interests. It does not concern conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement and to the violation of a collective agreement.[23] Within those limits, the right to strike should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute. Consequently prohibiting strikes not aimed at concluding a collective agreement is not in conformity with Article 6 § 4.[24]

The question about the purposes of strike actions was raised again with Russia by the ITUC (International Trade Union Confederation) in 2014.[25]

In accordance with the legislation in Russia, the right to strike occurs in the circumstances directly specified in the Labor Code. Art. 409 of the Labor Code states that workers or their representatives have the right to declare a strike against an organization if procedures for reconciliation have not produced a settlement of a collective labor dispute (Art. 406 of the Labor Code), or if the employer (or its representatives) or the employers (or their representatives) do not comply with the agreement arrived at by the parties to the collective labor dispute in the course of resolving that dispute (Art. 408 of the Labor Code), or if they fail to carry out a decision resulting from labor arbitration.

Hence, the right to strike in Russia is tightly bound to collective labor disputes and is recognized only as the last stage in their resolution following the reconciliation procedures which the parties to the dispute are advised to use in conducting a collective labor dispute.

The concept of a collective labor dispute is likewise strictly defined by legislation as an unsettled disagreement between workers (or their representatives) and employers (or their representatives) on issues listed in Art. 398, part 1 of the Labor Code. Collective labor disputes may be initiated:

– to establish or modify work conditions (including wages);

– in connection with concluding, modifying or executing collective bargaining agreements;

– in response to refusal by an employer to take into account the opinion of a workers' representative body concerning internal procedures and policies.

If workers state demands on matters that are beyond this list, then those demands may not be the basis of a collective labor dispute, and the employer (or his representatives) is under no obligation to enter into negotiations in order to accommodate those demands.

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[23] ECSR Conclusions I, Statement of Interpretation of Article 6 § 4, at 56, and Digest of the Case Law, *supra* note 21, at 56.

[24] ECSR Conclusions IV, Germany, at 50, and Digest of the Case Law, *supra* note 21, at 56.

[25] ECSR Conclusions 2014 (Russian Federation) (Apr. 11, 2017), available at http://hudoc.esc.coe.int/eng#{«ESCDcIdentifier»:[«2014/def/RUS/6/4/EN»]}.

Furthermore, disagreement among the parties in the course of collective bargaining does not constitute a collective labor dispute, and a strike may not be called even if the collective bargaining has resulted in a statement of disagreement that specifies all the points on which the parties to the bargaining differ. In order for workers to settle disagreements arising during collective bargaining, they must state their demands via a special procedure for collective labor disputes. If the employer then rejects those demands, a collective labor dispute exists.

The procedure for mounting a collective labor dispute and also the procedures for resolving one impose a multitude of restrictions and formal requirements that are difficult for workers to satisfy. A strike may be declared illegal on the basis of any missed deadline, either for one of the procedures required in a collective labor dispute, or in submitting the dispute to reconciliation procedures, or even missing the deadline for declaring and mounting the strike. As will be detailed below, when the courts consider cases on the legality of strikes, even the most insignificant technical faults are regarded as grounds to find against workers.

This means that, according to Russian law, the right to strike is directly attached to the resolution of a collective labor dispute, and a strike may not be conducted in the absence of such a dispute.

Nevertheless, the law does grant as a separate right to individual workers permitting them to refuse to work.

The Labor Code espouses the concepts of "work stoppage because of unpaid wages"[26] and "self-defense of labor rights."[27] According to Art. 142 of the Labor Code, a worker may refuse to work in the event that she has not been paid within 15 days for a completed pay period and has submitted written notice of her refusal to the employer. Art. 379 of the Labor Code stipulates that a worker may refuse jobs not specified in an employment contract or that directly threaten his life and health. Even if large groups of workers refuse to work, such work stoppages are not regarded as strikes under the law.

2. Collective Labor Disputes and Strikes: Prevalence in Russia

An estimate of the number of collective labor disputes and strikes in Russia may be derived from three official sources of information: data on strikes from the Federal State Statistics Service of the Russian Federation (Rosstat); on collective labor disputes from the Federal Labor and Employment Service (Rostrud); and on court cases determining whether strikes are illegal from the Judicial Department of the Supreme Court of the Russian Federation (JD Supreme Court RF and Supreme Court RF respectively).

[26] Art. 142 of the Labor Code.

[27] Art. 379 of the Labor Code.

According to Rosstat statistics that track the number of strikes in Russia, their number has fallen steadily since the passage of the Labor Code in 2001. Between 1991 and 2000 the number of strikes in Russia ran from the thousands to more than ten thousand each year. From 2001 on, Rosstat recorded much lower figures for strikes (in 2002 – 80 strikes; 2003 – 67; 2004 – 5,933; 2005 – 2,575) and only single digits for all years from 2006 to the present (2006 – 8; 2007 – 7; 2008 – 4; 2009 – 1; 2010 – 0; 2011 – 2; 2012 – 6; 2013 – 3; 2014 – 2; 2015 – 5).[28]

This sharp reduction in strikes is usually attributed to improving social and labor relations and to greater well-being throughout the population. However, we would maintain that this reduction is due not so much to those factors as it is to the way in which strikes are counted. Not every work stoppage is recorded as a strike, but only those stoppages that are directed at resolution of a collective labor dispute as understood in the Labor Code. Moreover, Rosstat summarizes only the information provided by the employers themselves. Any strike that is not reported to Rosstat by an employer is not included in the statistics.

The second official source is Rostrud's tabulation of collective labor disputes. Testimony to the effect that a collective labor dispute exists must be presented directly to the territorial agencies of Rostrud by all the legal entities engaged in them, and Rostrud's territorial agencies in turn report them to Rostrud itself. The officially published Rostrud data shows that the number of collective labor disputes in Russia from 2006 through 2012[29] has also been rather low (Table 1).

Table 1. Number of collective labor disputes recorded by Rostrud from 2006 through 2012[30]

Year	**Number of collective labor disputes recorded**	**Number of unsettled collective labor disputes**	
		Total	Number in which Rostrud participated
2006	18	18	8
2007	9	7	7
2008	17	16	13

[28] Федеральная служба государственной статистики (Росстат), Российский статистический ежегодник – 2014 г. [Federal Service of State Statistics (Rosstat), Russian Statistical Yearbook 2014] (Apr. 11, 2017), available at http://www.gks.ru/bgd/regl/b14_13/Main.htm; Социально-экономическое положение России – 2015 г. [Socio-Economic Situation in Russia 2015] 230 (Apr. 11, 2017) available at http://www.gks.ru/free_doc/doc_2015/social/osn-12-2015.pdf.

[29] Unfortunately, the data on collective labor disputes from 2013 to 2015 has not been published.

[30] From the official website of the Federal Labor and Employment Service (Apr. 11, 2017), available at http://www.rostrud.ru/control/sotrudnichestvo-i-partnerstvo/?ID=236470&sphrase_id=135689.

2009	6	6	2
2010	9	9	7
2011	7	7	3
2012	10	9	5

The third (and final) existing source of state information is the JD Supreme Court RF statistics on court cases considered by courts of the Russian Federation on whether strikes are illegal and in which damages are assessed.[31] Table 2 presents the statistics from the JD Supreme Court RF for the past several years which show the number of cases determining the legality of strikes and their disposition.

Table 2. Statistics on the court caseloads where the legality of strikes is at issue and damages are assessed in connection with them from the Judicial Department of the Supreme Court of the Russian Federation (JD Supreme Court RF)[32]

Year			**Cases decided in court**					
	Cases filed	Carried over from the preceding year	Total considered	Pleas granted (Number of cases/as a percentage of those considered)	Pleas denied	Cases closed	Cases still in litigation	Cases concluded
2009	79	20	64	40/62.5%	24	18	4	90
2010	38	9	34	24/70%	10	8	3	45
2011	39	2	31	21/67%	10	7	3	41
2012	100	0	27	19/70%	8	65	4	97
2013	327	3	38	24/63,1%	14	289	1	328
2014	24	2	10	10/100%	0	6	3	20
2015	19	6	18	16/89%	2	20	5	20

[31] The number of cases in each of these categories is not recorded separately, but it is beyond question that the vast majority of these strikes are judged illegal.

[32] The author has compiled statistics from the website of the JD Supreme Court RF (Apr. 11, 2017), available at http://www.cdep.ru. Statistics on decisions about the legality of strikes for 2016 have not been published as of April 11, 2017.

An attempt to reconcile the statistics from Rosstat, Rostrud, and the JD Supreme Court RF during the years when data is available from all three bodies (Table 3) shows the absence of correlation. The number of cases in courts determining the legality of strikes is significantly higher than the number of recorded collective labor disputes and strikes.

Table 3. Number of strikes recorded by Rosstat, collective labor disputes recorded by Rostrud, and cases determining the legality of strikes filed/considered from 2009 through 2012 by courts of the Russian Federation

Year	Number of strikes recorded by Rosstat	Number of collective labor disputes recorded by Rostrud	Number of cases determining the legality of strikes filed/ considered by courts in the Russian Federation
2009	1	6	79/64
2010	0	9	38/34
2011	2	7	39/31
2012	6	10	100/27

A comparison of Rostrud's statistics on the number of collective labor disputes with those from the JD Supreme Court RF on cases on the legality of strikes highlights the unreliability of the former. Filing a plea in court to rule that a strike is illegal must occur after the declaration of a strike to resolve a collective labor dispute. This means that the number of collective labor disputes should be at least comparable to the number of cases in court about the legality of strikes. The unreliability of Rostrud's statistics would seem to arise from the way in which they are compiled, which depends upon the willingness of employers to report and to judge on their own whether there is a collective labor dispute.

Is the data of the JD Supreme Court RF indicative of the number of strikes? There is no information about how frequently employers (or prosecutors who have the same prerogative) file pleas in court to find strikes illegal. From experience we see that this prerogative is employed quite broadly. However, because filing such a plea in court is usually a means to head off a strike (and most often succeeds in doing so), it would be wrong to infer a particular number of strikes from the number of court cases.

Could the number of strikes in fact be as low as Rosstat statistics indicate?

The data collected by the Center for Social and Labor Rights (CSLR) beginning in 2008 is based on analysis of information from mass media, internet websites, and news sites; it shows that in 2008 there were 60 instances of work stoppages, 106 stoppages in 2009, 88 in 2010, 91 in 2011, 95 in 2012, 102 in 2013, 97 in 2014, 168 in 2015, 158 in

2016.[33] Work stoppages are not the only and not even the most widespread form of labor protest. Making demands, meetings outside the workplace, and appeals to the authorities are far more widespread.[34] Complete or partial work stoppages at enterprises accounted for as much as 64% of protests in 2008 (the maximum percentage for the whole period from 2008 to 2016) and as little as 33% in 2013 (the minimum percentage during that period). The recent figures for the percentage of work stoppages are 37.7% in 2015 and 38.4% in 2016.[35] The proportion of collective labor disputes and strikes following the procedures prescribed by law was negligible.

The Center for Monitoring and Analysis of Labor Conflicts, which tracks social and labor conflicts and is affiliated with the Saint Petersburg University of the Humanities and Social Sciences, found 186 instances of social and labor conflicts (SLC) in 2016 (140 SLC in 2014, and 161 SLC in 2015) including 42 strikes and 22 refusals by workers to carry out job assignments because of wage arrears.[36]

The non-governmental monitoring aimed at assessing the actual situation provides statistics for strikes, labor protests, and labor conflicts that are significantly higher than the official figures. As they show, workers involved in labor conflicts employ means other than the formal procedures for resolving collective labor disputes or mounting strikes to work out their problems. Why is this the case from legal point of view?

3. Reasons for Resolving Labor Conflicts without Resorting to Formal Collective Labor Disputes and Strikes

An analysis of the use of alternative mechanisms, as well as interviews with participants in labor conflicts, indicates that workers and their representatives reject the means established by law for resolving collective labor disputes, including officially declared strikes, and that for a number of reasons they prefer to use other informal methods.

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[33] Бизюков П. Трудовые протесты в России в 2008–2016 гг.: Аналитический отчет по результатам мониторинга трудовых протестов ЦСТП (15 февраля 2017 г.) [Pyotr Bizyukov, *Labor Protests in Russia from 2008 to 2016: Analytical Report on Results of Monitoring of Labor Protests of the Center for Social and Labor Rights (February 15, 2017)*] (Apr. 18, 2017), available at http://trudprava.ru/expert/analytics/protestanalyt/1807. This is an analytical report by Pyotr Bizyukov outlining the results of the monitoring of labor protests conducted by the Centre for Social and Labor Rights.

[34] *Id*.

[35] *Id*.

[36] Обзор социально-трудовых конфликтов в Российской Федерации в 2016 году (по материалам годового анализа Научно-мониторингового центра «Трудовые конфликты» Санкт-Петербургского гуманитарного университета профсоюзов) (16 февраля 2017 г.) [Survey of Social and Labor Conflicts in the Russian Federation in 2016 (adapted from the annual analysis of the Labor Conflicts Research and Monitoring Center of the Saint Petersburg University of the Humanities and Social Sciences) (February 16, 2017)] (Apr. 20, 2017), available at http://industrialconflicts.ru/lib/27/obzor__sotsialyno-trudowyh_konfliktow_w_rossiyskoy_fed.html.

3.1. Procedural Hurdles

The first one is the increasingly complicated procedures imposed on collective labor disputes and strikes by the law. Workers understand that the legally authorized procedures require substantial organizational capacity and are more like obstacles than means to a settlement. These procedures are discouragingly complicated whether examined in isolation or in comparison with the legislation in many foreign countries.[37] The most serious limitations concern the requirements for stating demands in collective labor disputes and declaring a strike (Arts. 399 and 410 of the Labor Code). In particular, the right to state demands and declare a strike, which would usually fall to trade unions, has been stripped from workers' representatives. Instead, there are stringent requirements for a quorum of all workers of an enterprise before stating demands and declaring a strike (to hold the necessary conference a quorum of two thirds of the delegates is required). There is also a limited procedure for taking those steps by collecting signatures (permitted only when a general meeting of all workers at an enterprise or the normally required conference cannot be arranged). There are also restrictive norms that determine how a collective labor dispute officially may begin. One of these is that, if the parties to collective bargaining have signed a protocol of disagreements, they may not later withdraw from the collective bargaining process and instead directly initiate a collective labor dispute on the same issues. Once such a protocol has been signed, employees would have to state and confirm in a general meeting or conference any demands that had already been set aside in the course of the previous collective bargaining (Art. 398 of the Labor Code). To declare a strike when there is an unresolved disagreement, workers would once more have to hold a general meeting or conference adhering to the same requirements as for stating demands. There is a series of other challenging steps that must be taken.[38] Even though the complicated nature of these procedures has long been acknowledged and discussed, nothing has been done toward making them simpler.[39]

3.2. Deviations from International Standards

Some norms of the Labor Code on resolving collective labor disputes and strikes are inconsistent with international labor standards. Russian trade unions brought a few complaints about the deviation of the Labor Code norms on resolution of

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[37] Lyutov 2014; Gerasimova 2014.

[38] *See for example* Герасимова Е.С. Законодательство России о коллективных трудовых спорах и забастовках: проблемы и направления совершенствования, 1 Трудовое право в России и за рубежом 29 (2012) [Elena S. Gerasimova, *Russian Legislation on Labor Disputes and Strikes: Problems and Ways to Improve*, 1 Labor Law in Russia and Abroad (2012)]; Герасимова Е.С. Изменен порядок разрешения коллективных трудовых споров и организации забастовок. Достигнута ли цель?, 1 Трудовое право 51 (2012) [Elena S. Gerasimova, *The Manner of Resolving Labor Disputes and Organizing Strikes Has Changed. Did It Reach the Goal?*, 1 Labor Law 51 (2012)]; Lyutov 2014; Gerasimova 2014.

[39] *Supra* note 3.

collective labor disputes and on strikes from the relevant international labor standards before the ILO Committee on Freedom of Association (Cases No. 2216, 2251, 2244 and 2199), and the Committee issued a series of recommendations for revising Russian legislation. The ILO Committee of Experts and the European Committee of Social Rights also issued recommendations prompted by noncompliance with international standards. Among the issues pointed out were restrictions on the level at which collective bargaining may take place; on the goals for strikes; on requirements for a quorum for valid general meetings and conferences; trade unions' ability to state demands in a collective labor dispute; limitation of the right to strike for broad categories of workers; and on the requirement during a strike to maintain too many kinds of work as minimally necessary.[40] Only a few of these recommendations to change the Labor Code were implemented, but the amendments did not change the basically restrictive nature of provisions in the Labor Code.[41]

3.3. Exclusion of Categories of Workers from the Right to Strike

The right to strike is prohibited for many categories of workers that are clearly not subject to such restrictions according to international labor standards.[42] Some categories of workers who earlier enjoyed the right to strike (rail road workers, air traffic controllers, etc.) now were deprived of the right to strike, and they have to seek other informal means not governed by the law to defend their interests.

3.4. Negative Consequences for Workers Who Defend Their Rights

Participants in collective labor disputes face hostile attitudes from employers, local and government officials (such as police, prosecutors, etc.) toward collective labor conflicts and protests. Law enforcement bodies are used as a means of intimidating workers to get them to refrain from collective disputes and strikes.[43] Participants in conflicts report that enforcement agencies, prosecutors, the Ministry

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[40] For more on this topic *see* Лютов Н.Л., Герасимова Е.С. Международные трудовые стандарты и российское трудовое законодательство: Монография [Nikita L. Lyutov & Elena S. Gerasimova, *Russian Labor Law and International Labor Standards: Compatibility and Prospects for Reconciliation: A Practical and Academic Guide*] 39–48 (2nd ed., augmented and revised, Moscow: Centre for Social and Labor Rights, 2015); Gerasimova, *Russian Legislation on Labor Disputes and Strikes*; Лютов Н.Л. Признание права на забастовку на уровне Международной организации труда: важно ли это для России и других стран?, 9 Актуальные проблемы российского права 118 (2015) [Nikita L. Lyutov, *Acknowledging the Right to Strike at the Level of the International Labor Organisation: Is It Important for Russia and Other Countries?*, 9 Actual Problems in Russian Law 118 (2015)].

[41] Gerasimova, *The Manner of Resolving Labor Disputes*, at 51–60 etc.

[42] Lyutov & Gerasimova 2015, at 45.

[43] Свобода объединения в России: практика, проблемы реализации и защиты прав: Доклад о нарушениях профсоюзных прав членских организаций Всероссийской конфедерации труда и Конфедерации труда России [Freedom of Association in Russia: Practices and Problems in Exercising and Defending Rights: A Report on the Infringement of the Trade Union Rights of Member of the Confederation of Labor of Russia and the All-Russia Confederation of Labor] (Moscow: All-

of Internal Affairs, and other *siloviki* use their authority to put pressure on people to relinquish not only their right to strike but even the mechanism for engaging in a collective labor dispute. For a large number of people defending their interests exacts such an unacceptably high price that they either abandon any defense of their interests or seek out means that are more roundabout and less confrontational.

3.5. Absence of a Tradition of Negotiated Settlements

As we analyze the situation, Russia lacks any broad, deeply rooted experience of working out disagreements through open negotiations in good faith that end in an agreement. In many cases employers are simply not prepared to examine a problem brought up by workers; or else, although they may understand the problem's importance, they are not ready to enter into dialogue, negotiations, and a sincere search for a way to resolve it. This comes about as a consequence of knowing that there is a whole catalogue of ways to evade substantive discussion by resorting to platitudes, force, the authorities, and other means – this is a consequence of living in a hierarchical society.[44] That problem afflicts various aspects of life in general and of labor relations, including collective labor relations, which constitute just one area where the phenomenon appears. It may be just one such area, but it provides a very crucial and significant insight into the social ranking and perceptions, as well as into the overall condition of society.

However, in the context of this article it is important to refer to these broadly pervasive circumstances because they enable us to understand why the complicated practices for applying the laws on collective labor disputes and strikes end up distorting the use of the law not to settle the matter under dispute, but to divert it into futile extralegal actions, or to "bury" it in bureaucratic procedures.[45] As a result workers and their representatives spend much effort on organizing collective labor disputes and on resolving them by legal procedures, but that effort may be useless for resolving disputes and managing problems that workers encounter.

In addition to the reasons already cited, we find that judicial treatment of cases involving collective labor disputes is implicated most of all in cases where the legality of strikes is at issue.

This role of the courts has been studied very little and has received scant attention in discussions of the effectiveness of regulating collective labor disputes

Russia Confederation of Labor, 2009) (Apr. 14, 2017), also available at https://publications.hse.ru/books/69541345.

[44] Петрановская Л. Почему мы такие злые?, Нескучный сад, 21 мая 2012 г. [Lyudmila Petranovskaya, *Why are We So Nasty?*, Neskuchny Sad, May 21, 2012] (Apr. 14, 2017), available at http://www.nsad.ru/articles/pochemu-my-takie-zlye.

[45] *See further, for example*, Герасимова Е.С. Забастовка как средство защиты трудовых прав граждан, 3 Право и экономика (1999) [Elena S. Gerasimova, *The Strike as a Means to Defend the Labor Rights of Citizens*, 3 Law and Economics (1999)].

and strikes. In the remainder of this paper, we shall examine the legal reasoning and court precedents in cases involving collective labor disputes and judgments on the legality of strikes.

4. The Role of Court Decisions in Collective Labor Disputes and Strikes

In addition to the reasons already cited for avoiding official mechanisms for resolution of labor conflicts, we find that judicial treatment of cases involving collective labor disputes is implicated most of all in cases where the legality of strikes is at issue.

This role of the courts has been studied very little and has received scant attention in discussions of the effectiveness of regulating collective labor disputes and strikes. In the remainder of this paper, we shall examine the legal reasoning and court precedents in cases involving collective labor disputes and judgments on the legality of strikes.

We find that the courts are a major factor in making the legal mechanisms for resolving collective labor disputes and strikes extremely burdensome and ineffective in practice. The principal reason for this is that employers and prosecutors have long employed entering a plea in court to rule a strike illegal as an effective manoeuver to discourage strikes from happening.

Upon a petition by an employer or a prosecutor, a strike may be declared illegal in courts for a variety of reasons. The decision that a strike is illegal will have undesirable consequences for workers and trade unions: workers must abandon the strike and return to work no later than the day after a copy of the court's decision is delivered to whatever body is in charge of the strike. Workers who have not promptly abandoned an illegal strike may be liable to disciplinary action and penalties imposed by governmental agencies for losses suffered by the employer during the illegal strike.

The statistics from the JD Supreme Court RF (Table 2) show that the majority of strikes considered in court proceedings are declared illegal (from 62.5 to 100% of cases). The trend increased in 2014, as the courts considered the smallest number of cases on the legality of strikes in the last six years (10 cases out of 24 filed in 2014), in all ten cases the strikes were found illegal.

When a plea is rejected, the grounds are usually that the court has found that there was no collective labor dispute, which is a necessary precursor of a legally constituted strike. For many years there have been only a few isolated cases in which a court did not declare a strike illegal when there was a collective labor dispute.[46]

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[46] One example is the Decision of the Supreme Court of the Russian Federation of June 21, 2013 No. 80-APG13-1 [Определение Верховного Суда РФ от 21 июня 2013 г. № 80-АПГ13-1].

Employers usually file a suit on the legality of a strike before the strike begins after it has been just declared in order to head it off.[47] The courts have a very "accommodating" attitude toward such pleas. Even though the civil procedural legislation does not provide a special short term for considering pleas in this category,[48] court hearings for examining are set promptly after filing complaints. The courts almost always accept immediately a plea for the postponement of a strike that has not begun (or for the suspension of a strike in progress) for 15 days.

A court case on the legality of a strike is always considered during its postponement or suspension, after which the court generally finds that the strike is illegal. Thus court cases about the legality of strikes are an effective tool for preventing strikes. After such a court decision workers almost never start or continue the strike because they would then become liable for their participation in an illegal strike.

If a strike has already happened, the employer has no motivation to take the case to court, as it is too late for a court decision to forestall the strike.

5. The Role of Judicial Reasoning in Cases on the Legality of Strikes

As we see from the judicial statistics and practical experience, all or almost all strikes are ruled illegal. How does this occur?

The reasons for declaring strikes illegal are set out in the Labor Code. A strike is illegal if it is called without regard for the time limits, procedures, and requirements imposed by the Labor Code or if it is declared in workplaces where strikes are prohibited by the Labor Code or federal laws.

In practice grounds are "discerned" for finding almost any strike illegal. There are evident infractions of law that provide nearly incontestable justification for finding in favor of pleas. The law makes no distinction between serious and trivial violations of the time limits, procedures, and requirements; and neither do the courts. In consequence, the legal burden of "time limits, procedures, and requirements" is so onerous that it is practically impossible to bear. Hence, there is a predominance of decisions that strikes are illegal.

An analysis of court decisions on finding strikes illegal because of a violation of one of the unambiguous procedural norms of the law would not be of much interest. However, there is group of court decisions on strikes that are extremely interesting to analyze.

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[47] For circumstances in which it is to the employer's advantage to file a suit on the legality of a strike, *see* Герасимова Е.С. Как работодателю реагировать на забастовку, 9(70) Кадровик.ру 8 (2012) [Elena S. Gerasimova, *How Employers React to Strikes*, 9(70) Kadrovik.ru 8 (2012)].

[48] Such cases fall under the general two-month term set by the Civil Procedure Code of the Russian Federation (GPK RF) (Art. 154 of the Labor Code).

The study of judicial precedents shows that they contain a wealth of interpretations on matters that are either not addressed or left ambiguous in the law. In these circumstances the legal reasoning of the courts becomes a crucial source of law and exerts a strong influence on the application of the legislation on collective labor disputes and strikes.

It seems that many of these interpretations are ambiguous, very broad, or inconsistent. They indicate that the courts favor ruling strikes illegal.

Therefore, it appears that the courts are a distinct and essential added factor in inhibiting strikes. They restrict the already narrow course for collective labor disputes, encumber the right to strike, and leave almost no way to mount a strike legally in Russia.

In what follows we examine some of these problems and some of the more questionable approaches in judicial precedents.

5.1. Uncertainties about the Existence of a Collective Labor Dispute

A clear understanding about the existence of a collective labor dispute is of great importance for workers initiating labor disputes, primarily because that decision determines the applicability of procedures for resolving the dispute, which are costly and time-consuming. However, the distinction between individual and collective labor disputes is not always clear. There are several debatable issues,[49] no matter how widespread a dispute may be, that bear on whether a dispute is individual or collective according to the terms of a collective bargaining agreement and on how it should be settled.

According to Art. 381 of the Labor Code, an unsettled disagreement about the *applicability* of a collective agreement may result in an *individual* labor dispute. According to Art. 398 of the Labor Code, a *collective* labor dispute is an unsettled disagreement about the *fulfilment* of such agreements.

Even one court or judge does not always uniformly interpret what constitutes an individual or collective labor dispute. For example, during 2008 and 2009 the Savyolovsky district court of Moscow considered several suits brought by the Federal Union of Air Traffic Controllers of Russia (FPAD) regarding fulfilment of the terms of collective bargaining agreements between FPAD and the State Air Traffic Management Corporation. In one case FPAD cited the defendant's failure to adhere to the applicable collective bargaining contract by refusing to index base wages to reflect a percentage increase in revenues over previous revenues. The case was dismissed by the Savyolovsky district court of Moscow[50] on the grounds that "the

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[49] Стародумов Ю.О. Защитит ли профсоюз коллективный договор?, 1 Трудовое право в России и за рубежом 9 (2015) [Yury O. Starodumov, *Are Trade Unions Protected by Collective Agreements?*, 1 Labor Law in Russia and Abroad 9 (2015)].

[50] Определение Савеловского районного суда г. Москвы от 13 октября 2013 г. по делу № 2-5291/09 [Decision of the Savyolovsky district court of Moscow of September 13, 2013 on case No. 2-5291/09].

dispute is a collective labor dispute pursuant to an unsettled disagreement between workers and their employer about changes to and fulfilment of the collective bargaining agreement;" however, the base wages had earlier been altered by agreements between the parties, and the court could not condone the argument of FPAD that alterations to the base wages required only an order from the employer. The decision was affirmed by the Moscow City Court upon appeal by FPAD.

FPAD brought another case against the State Air Traffic Management Corporation on behalf of a group of workers to the effect that their additional leave days had been improperly calculated and that leave should have been calculated according to the terms of their collective bargaining agreement and that these workers were entitled to compensation for punitive damages. The decision of the Savyolovsky district court of Moscow was to dismiss the case on the grounds that it was outside the court's jurisdiction because there was a collective labor dispute.

This decision was annulled by the Moscow City Court,[51] and the case was to be reconsidered. The Moscow City Court reasoned that no labor dispute had arisen between collective participants, and this dispute did not constitute a collective labor dispute.

A similar situation was also considered by the Supreme Court RF in its decision on a plea entered by the Perm Pork Complex Trade Union against the Perm Pork Complex Corporation about indexation of salaries.[52] The trade union cited the collective agreement requiring indexation of salaries and requested that the employer be required to index salaries. The Supreme Court RF held that there had been an unsettled disagreement between workers and their employer, and thus a collective labor dispute existed; and as result the court agreed that the case was outside its jurisdiction.

We consider this reasoning infringes the legal principle that collective agreements must be upheld.[53] Failure to fulfil conditions of the collective agreement would come under Art. 381 of the Labor Code as basis for an individual labor dispute, and the choice of the legal mechanism to defend workers' right – either through individual labor disputes or by initiating a collective labor dispute – must be left to the workers. Uncertainty and absence of a clear judicial position create obstacles in resolution of labor disputes concerning implementation of collective agreements.

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51 Определение Московского городского суда от 19 февраля 2009 г. по делу № 33-3704 [Decision of the Moscow city court of February 19, 2009 on case No. 33-3704].

52 Апелляционное определение Верховного Суда РФ от 25 января 2013 г. по делу № 44-КГ12-5 [Appellate Decision of the Supreme Court of the Russian Federation of January 25, 2013 on case No. 44-KG12-5].

53 Art. 24 of the Labor Code.

5.2. Cases in Which Strikes are Permissible

According to Art. 398 of the Labor Code, a strike is exclusively a means to resolve a collective labor dispute. Art. 37, part 4 of the Constitution of the Russian Federation is less definite and allows debate about whether a strike may be suitable for individual labor disputes.[54] The ILO Committee on Freedom of Association has advised that strikes must be recognized in Russia also as a means either to obtain recognition for a trade union, or to protest the economic and social policies of the government, or to demonstrate solidarity.[55]

We will examine the need to legalize strikes to obtain recognition for a trade union. In Russia trade unions are authorized to act without registering as legal entities, merely on the basis of taking a decision to create a trade union, electing governing and oversight bodies and approving a charter. No legal procedure for recognition of a trade union exists, and trade unions do sometimes encounter non-recognition by employers. Also, strikes that demand recognition of a trade union do actually occur.

As one illustration, the Supreme Court RF heard a case brought by the Kurgan-energoremont Company against its grassroots trade union, Zashchita-Remont, on the legality of a strike.[56] The demands during the strike were to cease discrimination against members of the union and to provide conditions suitable for the operation of the union. The court found that no collective labor dispute had arisen and did not find the strike illegal. Nevertheless, the case demonstrates the need for granting the right to strike to obtain recognition of trade unions and also the pertinence of the recommendations on this issue.[57]

5.3. Broad and Ambiguous Interpretations of the Grounds for Ruling Strikes Illegal

When the resolution of a collective labor dispute or a strike are in overall conformity with the Labor Code, the grounds for finding a strike illegal may be found by courts by means of a broad or ambiguous interpretation of the law. A few examples follow.

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[54] Нуртдинова А.Ф. Прекращение работы в связи с невыплатой заработной платы: попытка правового анализа, 8 Журнал российского права 27 (2000) [Aliya F. Nurtdinova, *Work Stoppages Caused by Unpaid Wages: A Preliminary Legal Analysis*, 8 Russian Law Journal 27 (2000)]; Герасимова Е.С. Процессуальные особенности рассмотрения судом дел о признании забастовки незаконной: Дис. … канд. юрид. наук [Elena S. Gerasimova, *Distinctive Procedural Features in Judicial Consideration of Cases on the Legality of Strikes: PhD thesis*] 20–24 (Moscow, 2002); Кливер Е.П. Право на забастовку в Российской Федерации: Дис. … канд. юрид. наук [Evgeny P. Kliver, *The Right to Strike in the Russian Federation*: *PhD thesis*] 12 (Tomsk, 2000).

[55] For more on this topic *see* Lyutov & Gerasimova 2015, at 41–43.

[56] Определение Верховного Суда РФ от 7 июля 2006 г. № 82-Г06-2 [Decision of the Supreme Court of the Russian Federation of July 7, 2006 on case No. 82-G06-2].

[57] Lyutov & Gerasimova 2015, at 41–43, 182–183.

The Labor Code stipulates rules for conducting general meetings of workers and conferences during a collective labor dispute (both to state demands on a collective labor dispute and to call for a strike). Meetings are duly constituted if more than half the workers are in attendance, and conferences are if at least two thirds of the elected delegates attend. Demands via a collective labor dispute must be supported with a majority of the votes of the workers (or delegates) at the meeting (or conference). If holding a meeting of workers (or convening a conference) is not possible, a workers' representative body may validate its motion by collecting the signatures of more than half of the workers in favor of the demands to be put forward or in favor of calling a strike. Courts interpret these requirements rather broadly.

Thus, the presence of persons who work for a different employer, at a meeting held to elect delegates to a conference has been considered by court as violation of law. In its decision on the legality of a warning strike at the Faurecia auto parts plant, the Supreme Court RF found that persons who were not workers on the permanent staff of Faurecia were present at the meeting and concluded that it could not ascertain that "the demands had been made at the behest of the workers at Faurecia or that the delegates so elected were acting in the interests of these workers."[58]

In another case on the legality of a strike at the Mechel Remservis Company, registration of delegates to a conference without proper documents establishing their identity, absence of records listing the delegates, and omissions in such a list, among other findings, were counted by the Supreme Court RF as infractions, although the Labor Code has no such requirement on these issues.[59]

The Court found that the strike was illegal because

> the official registration of each delegate present at the conference… did not proceed *on the basis of documents establishing their identity* and inasmuch as related documentation (records and forms with the names of delegates in attendance and absent)… The records of the credentials committee for the conference… that confirmed that authorization of the 32 delegates in attendance also *failed to maintain a schedule of those in attendance at the conference that included their names*… and… the documentation for the conference of the labor collective concerning the declaration of a strike… was signed by Mr. T., the chairman of the conference. However, the documentation *lacks any information about the election of Mr. T. to the post of chairman of the conference* of the labor collective.

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[58] Апелляционное определение Верховного Суда РФ от 25 мая 2012 г. № 33-АПГ12-2 [Appellate Decision of the Supreme Court of the Russian Federation of May 25, 2012 on case No. 33-APG12-2].

[59] Апелляционное определение Верховного Суда РФ от 2 марта 2012 г. № 66-Г12-2 [Appellate Decision of the Supreme Court of the Russian Federation of March 2, 2012 on case No. 66-G12-2].

In a case on the illegality of a strike by workers of the First Stevedore Company it was found that the delegates elected to participate in a conference were duly constituted to set forth demands about increases in wages and salaries (the minimum to be paid for labor), but were not authorized to call a strike.[60]

Another example demonstrates the narrow interpretive standard concerning the time limit for carrying out a warning strike. In a case to determine the legality of a warning strike at the Faurecia auto parts plant, the reason for ruling that strike illegal was an inordinate delay in mounting it.[61] In that case by November 14, 2011, no agreement between the parties to the collective dispute had been reached, and parties did not invoke labor arbitration. A one-hour warning strike was declared on November 27, 2011, that is, after the reconciliation procedures had been closed. The Labor Code at that time provided that, after five calendar days of operation of the reconciliation committee, a single warning strike limited to an hour's duration three work days prior to the inception of the actual strike may be conducted. The phrase "after five days of operation of the reconciliation committee" in Art. 410 of the Labor Code means only the earliest day on which a warning strike may be conducted rather than a limited period during which it must be conducted. However, in this case the norm was interpreted as a prohibition against a warning strike taking place after the conclusion of reconciliation procedures.

5.4. Inconsistency in the Legal Reasoning in Court Decisions

Inconsistency in the legal reasoning of the courts over time concerning issues that are not settled clearly in the legislation seems to be a serious problem. We shall take up a few examples.

5.4.1. Interpretation of the Norms on the Procedure for Declaring a Warning Strike

The Labor Code's requirements for conducting a warning strike are simpler than for an ordinary strike, but they are governed by legislation that is extremely sketchy. In particular, it is not clear which body is authorized to declare a warning strike and in what manner.

In a 2012 decision on the illegality of a strike at the Ford Motor Company the Supreme Court RF indicated that, according to Art. 410 of the Labor Code, a warning strike is not a special kind of activity that is to be concluded and conducted in manner different than a regular strike.[62] The Supreme Court RF concluded that a workers' representative body is authorized only to propose declaring a strike to

[60] Определение Верховного Суда РФ от 21 марта 2008 г. № 78-Г08-5 [Decision of the Supreme Court of the Russian Federation of March 21, 2008 on case No. 78-G08-5].

[61] Апелляционное определение Верховного Суда РФ от 25 мая 2012 г. № 33-АПГ12-2 [Appellate Decision of the Supreme Court of the Russian Federation of May 25, 2012 on case No. 33-APG12-2].

[62] Апелляционное определение Верховного Суда РФ от 23 марта 2012 г. № 33-Г12 [Appellate Decision of the Supreme Court of the Russian Federation of March 23, 2012 on case No. 33-G12].

workers, but the decision to do so belongs solely to a meeting (or conference) of workers. Because it had not followed this procedure, the warning strike at the Ford Motor Company was found illegal.

However, in considering a case in 1998 on the legality of a warning strike at the Kaliningrad Commercial Port, the Supreme Court RF[63] relied on similar norms of the Federal law "On Resolution of Collective Labor Disputes," and stated that:

> In ruling this warning strike illegal the court has applied to it the provisions of the law governing the declaration and execution of an ordinary strike. However, the procedure for declaring and conducting a warning (or hourly) strike is set forth only in Art. 14, para 3 of the Federal law "On Resolution of Collective Labor Disputes."

The Supreme Court RF thus concluded that norms on declaring and conducting ordinary strikes should not be applied.

During a strike in 2012 the workers' representatives at the Ford Motor Company had been proceeding under that assumption, but the Supreme Court RF applied a different and even opposed interpretation of the law as the justification for finding the strike illegal.

We consider the reasoning of the Supreme Court RF in the first case from 1998 properly argued. Moreover, requirements for declaring an ordinary strike[64] would make it impossible to fulfil the time limits when declaring a warning strike: under the Labor Code (as amended by Federal law of November 22, 2011 No. 334-FZ) warning strikes may be conducted during the operation of a reconciliation committee, which is 3 or 5 days depending on the level of the dispute.[65] At the same time, notification of a warning strike is to be issued 2 or 4 days in advance of the strike depending on the level of the dispute, and it may occur after the 3rd and 4th days of the operation of the reconciliation committee. Because this interpretation also stipulates that a warning strike must occur while the reconciliation committee is in operation, these time limits mean that a warning strike would have to be declared on the very first day that the reconciliation committee is convened.

Under the interpretation of warning strikes from the Supreme Court RF's decision of 2011, a warning strike is ruled out in principle. In this situation we consider it important to affirm, either through modifications to the Labor Code or by changes

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63 Определение Верховного Суда РФ от 5 февраля 1998 г. № 71-Г97-5 [Decision of the Supreme Court of the Russian Federation of February 5, 1998 on case No. 71-G97-5]; Коллективные трудовые споры: Пособие профсоюзному активисту [*Collective Labor Disputes: Manual to the Trade Union Militant*] 249 (E.S. Gerasimova (ed.), Moscow: Centre for Social and Labor Rights, 2000).

64 Art. 410, para. 6 of the Labor Code.

65 Art. 403 of the Labor Code.

in the legal stance of the Supreme Court RF, that the decision to conduct a warning strike does not fall under the regulations pertaining to an ordinary strike.

5.4.2. Clarification of the Concept of a Free-standing Structural Division

According to the Labor Code employees can organize a collective labor dispute or a strike in organization itself, in field offices, or in representation or free-standing structural divisions of the organization. The concept of a free-standing structural division of the employer does not appear in labor legislation, but rather in the Tax Code of the Russian Federation (Art. 11, para. 2) and in the Civil Code of the Russian Federation (Art. 55) where it is not applied to collective labor disputes.

A definition of a free-standing structural division has emerged over time in cases about the legality of strikes, but the Supreme Court RF has also altered its stance over time. In 2004 in a case on a strike at Bashkirian Airlines it stated[66] that

> recognition of an organization's free-standing structural division as such may proceed whether or not its creation is referred to in the organization's founding or other organizational and administrative documentation. One of the criteria in this matter may be territorial separation and the presence of a fixed and permanent workplace where it is located…

The flight crews were assigned to a separate division. The Supreme Court RF took into consideration that the jobs of the flight crews are subject to special conditions with particular regulatory standards outside the physical facilities of the airline, and they are subject to special salary scales and pension contributions.

> Therefore, in the resolution of the collective labor dispute, the flight crews may, in view of the nature of their activities, have their own special interests that differ from those of the employees of the airline's other divisions, including with respect to setting the conditions and payment for labor.

At a later date the Supreme Court RF revised its thinking. It determined that these features were lacking for an aircraft maintenance base, which did not constitute a free-standing structural division inasmuch as "a cessation of work at the aircraft maintenance base would render the operation of the enterprise as a whole impossible."[67] The positions were similar for a theatre orchestra,[68] a truck

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[66] Определение Верховного Суда РФ от 2 ноября 2004 г. № 49-Г04-87 [Decision of the Supreme Court of the Russian Federation of November 2, 2004 on case No. 49-G04-87].

[67] Определение Верховного Суда РФ от 10 февраля 2006 г. № 74-Г06-4 [Decision of the Supreme Court of the Russian Federation of February 10, 2006 on case No. 74-G06-4].

[68] Определение Верховного Суда РФ от 1 декабря 2006 г. № 48-Г06-20 [Decision of the Supreme Court of the Russian Federation of December 1, 2006 on case No. 48-G06-20].

maintenance shop for a mining company,[69] a distribution center, a receiving department, a customer reception center, and an expediting center of the company "Flora"[70] along with others.

One of only few cases of recognition of a free-standing structural division is the decision of the Supreme Court RF in which it ruled that the "Red Cap" coal mine along with four others was a structural division of the SUBR Corporation, and the refusal of the mine's workers to perform their duties posed no threat of disruption of work at the corporation's other divisions, and thus workers of this coal mine had the right to initiate a collective labor dispute and declare a strike as a free-standing structural division of the SUBR Corporation.[71]

The approach that is now in place constitutes a severely restrictive and indeed prohibitive impediment to collective labor disputes even in divisions that are clearly free-standing. Thus the right to conduct collective labor disputes and strikes at free-standing structural divisions is a mere fiction due to the definition developed by the Supreme Court RF. We propose that the definition of free-standing structural divisions employed by the Supreme Court RF be revised to allow greater leeway for conducting collective labor disputes in them.

5.4.3. Lack of Clear Criteria for Knowing in Advance Whether a Strike is Legal

According to Art. 413 of the Labor Code strikes may be illegal and impermissible "unconditionally" and "conditionally" ("if conducting a strike constitutes a threat to the defense of the country, its government, or the life and health of individuals"). The right to strike may be also restricted by federal law.

Allowing for the possibility of a threat as an element in the grounds for ruling a strike illegal has a positive aspect because it prevents ruling a strike illegal in the fields listed in the Labor Code if there is no such threat. On the other hand, it is difficult to assess the existence of a threat. There is room for a very broad interpretation (especially because the courts generally are hostile toward strikes), and even a purely hypothetical and undemonstrated threat may be unreasonably adduced as sufficient to rule a strike illegal. Using such reasoning, any strike in the fields listed in the Labor Code could be ruled illegal.

Hence, determining the likelihood of a threat is left exclusively to the courts, and workers who declare a strike cannot know whether or not it will be deemed legal by court. The courts make that assessment only after all the procedures for resolving a collective labor dispute are exhausted. To judge from the general willingness of

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[69] Определение Верховного Суда РФ от 26 августа 2005 г. № 93-Г05-14 [Decision of the Supreme Court of the Russian Federation of August 26, 2005 on case No. 93-G05-14].

[70] Определение Верховного Суда РФ от 28 мая 2009 г. № 19-Г09-5ю [Decision of the Supreme Court of the Russian Federation of May 28, 2009 on case No. 19-G09-5yu].

[71] Определение Верховного Суда РФ от 18 июля 2008 г. № 45-Г08-12 [Decision of the Supreme Court of the Russian Federation of July 18, 2008 on case No. 45-G08-12].

the courts to ban strikes based on their illegality, it is highly probable that any strike in one of the fields mentioned in the Labor Code will be ruled illegal.

The decision of the Supreme Court RF on the legality of a strike at the Omsk Airport Company[72] (decision of July 18, 2008 No. 45-G08-12) demonstrates this as it states:

> The court notes the requirement that the decision by the conference of the employee collective of the Omsk Airport Company may not infringe the rights of passengers, and the court may not deem it permissible merely because on January 30, 2009, between 11 and 12 o'clock local time, no flights were scheduled… One of the grounds for the present plea to declare the strike illegal is the risk of inflicting harm in the future. The gap in the schedule for traffic of aircraft with ticketed flights at the time indicated does not grant employees the right to refuse to register passengers for flights that may take place off schedule as a result of delays for various reasons, including weather conditions… The refusal of the employees of the Omsk Airport Company to register passengers may cause harm to passengers on those flights that have altered schedules because individuals would have to wait for their flight departures.

In this case the court's supposition of possible harm is purely hypothetical and without a factual basis. Nevertheless, it was employed to justify ruling the strike illegal.

Conclusion

This paper has examined official statistics on collective labor disputes, strikes, and court cases on finding strikes illegal alongside the results of monitoring by non-governmental organizations. Further we explored how the legislation on collective labor disputes and strikes is applied in practice, particularly by courts, and how these practices influence workers and trade unions in their choice of strategies for labor conflicts. We found that judicial interpretations impact the legislation on collective labor disputes and strikes to make it inapplicable for workers as a solution to their problems in labor relations.

Examples analyzed show how judicial techniques are used to prohibit strikes. They demonstrate that the courts are inclined to reject strikes even when the workers (or their representatives) try in good faith to follow the requirements of the law that they can discern. The huge organizational effort that may go into observing

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[72] Определение Верховного Суда РФ от 26 февраля 2009 г. № 50-Г09-2 [Decision of the Supreme Court of the Russian Federation of February 26, 2009 on case No. 50-G09-2].

those requirements then ends in disaster, and the collective labor dispute or conflict remains unresolved.

We suggest that the factors we have described deprive workers of any hope of justice or means to defend their interests by using the legal procedures for collective labor disputes. This means that they will resort to strategies outside the law to settle their collective labor disputes and that the legislation is ineffective.

This outcome seems undesirable for both society and the state. The state has a direct interest in a return to procedures for resolving collective labor disputes that would regain the trust of the parties involved by providing predictable and effective ways to settle their disputes and conflicts. This requires a number of successive steps. Among them it would be essential, at least, to:

– allow cases about both collective and individual labor disputes to be heard in court with regard to the acceptance or fulfilment of collective bargaining contracts or agreements;

– restrain the broad judicial interpretations of the procedures and requirements for resolving collective labor disputes and for the declaration and mounting of strikes;

– establish criteria that would enable an understanding before the fact about whether a strike would be deemed illegal because it poses a threat to national security or to personal health and safety;

– allow that the conditions imposed on the declaration of a warning strike do not apply equally to a warning strike;

– establish a broader definition of what constitutes a free-standing structural division with the privilege of engaging in a collective labor dispute or strike.

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RUSSIAN LEGAL ORDER AND THE LEGAL ORDER OF THE EURASIAN ECONOMIC UNION: AN UNEASY RELATIONSHIP

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Eurasian integration has created a new legal order – the so-called "Union law" of the Eurasian Economic Union (EAEU). This legal order has its own narrative, principles, hierarchy of rules, and innovations such as the direct applicability of decisions of its regulatory body. Russian legal order is generally accommodating towards international law, which is equally applicable to Union law. However, the recent practice of the Russian Constitutional Court has claimed that Russia can set aside international obligations based on national constitution, which indirectly targets the viability of the EAEU legal order. This is further complicated by the Eurasian judiciary, which, as the main interpretative authority within the integration, has tried to take on an activist role, somewhat borrowing approaches from the European Union. In its turn, the Russian Constitutional Court has voiced its differences in certain approaches. This variability of practices and approaches clearly undermines the "unity" of the EAEU legal order and the interweaving of national and regional legal frameworks. This article analyses the relationship of the two legal orders to assess the possibilities for tensions between them. It points out the sources of such tensions, which lie in certain indeterminacies within the EAEU legal order, temptations to assert power, and recent far-reaching practices of the Russian Constitutional Court.

Keywords: Court of the Eurasian Economic Union; Russian Constitutional Court; constitutional law; legal order; Eurasian integration.

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Introduction

Russia is a founding member of the Eurasian Economic Union (EAEU) and is deeply entrenched into Eurasian integration. The legal framework of Eurasian integration by which Russia is bound is enormous.[1] As a founding member, Russia took an active part in drafting the EAEU Treaty – a process which required alignment with the generally recognised principles of international law, national legislation of Member States, taking into account international experience, but first and foremost with the national constitutions.[2] Therefore, in principle, tensions between the legal orders of the EAEU and Member States should have been minimized from the beginning. However, this is not necessarily so. In particular, certain practices of both the Eurasian and Russian judiciary are not unequivocal. Therefore, this article is aimed at unpacking possible tensions between the two legal orders – the Russian legal order and the legal order of the EAEU – and discovering sources of such tensions. The relevant issues lie primarily in the field of constitutional law, which will be of immediate concern in this article.

The issue of tensions between these two legal orders is pertinent given that the EAEU is a relatively new international organization of regional economic integration, and its legal order is being shaped. Even though research about the organization is developing fast, studies of issues of interrelations of the two legal orders are rather scarce. However, the foundations of the legal order have been established with the entry of the EAEU Treaty into force on January 1, 2015, which provides considerable

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[1] The EAEU Treaty has codified almost 100 international agreements concluded within the Eurasian integration process, most of them codified into the EAEU Treaty. See Codification of the Legal and Contractual Basis of the CU and SES (May 1, 2017), available at http://www.eurasiancommission.org/en/act/integr_i_makroec/dep_razv_integr/Pages/codification.aspx.

[2] Решение Комиссии Таможенного союза от 22 июня 2011 г. № 902 "О Рабочей группе по кодификации международных договоров, составляющих договорно-правовую базу Таможенного союза и Единого экономического пространства" [Decision of the Commission of the Customs Union No. 902 of June 22, 2011. On the Working Group on Codification of International Agreements, Forming the Legal Basis of the Customs Union and Single Economic Space] (May 1, 2017), available at http://www.tsouz.ru.

ground for analysis.[3] Moreover, although there is very limited jurisprudence of the EAEU Court, this article will rely on the jurisprudence of the preceding court – the Court of the Eurasian Economic Community (hereinafter – EurAsEC) – as certain cases can shed some light on the existent and possible future tensions between the legal orders. The EAEU Court comes in place of the EurAsEC Court, which was a judicial body of the now defunct Eurasian Economic Community, and of the Customs Union and the Single Economic Space.[4] Although the issue of succession between the two courts is somewhat blurred (the initial idea to ensure full legal succession was abandoned[5]), the case-law of the EurAsEC Court remains in force.[6]

Further pertinence of the topic is explained by a number of recent rulings handed out by the Constitutional Court of the Russian Federation, in particular those related to the European Court of Human Rights (hereinafter – ECtHR).[7] Although such rulings did not concern the EAEU, their indirect effect can be significant, as will be explored.

In order to achieve the stated aim, each of the article sections tries to identify sources for both direct and indirect tensions (in fact, the duality of tensions is a recurring theme throughout the article). The first section is devoted to unpacking the EAEU legal order in terms of its structure and functioning. The second section looks into how Russian law sees external law, including the law of the EAEU. The third section analyses the place and role of the Eurasian judiciary and the changes in the powers that it endured as possible sources for tensions. The fourth section looks deeper into case-law and covers the relations of national courts and the Eurasian judiciary.

Apart from the two legal orders, which are in the focus of the article, certain interventions are made into a third one – the legal order of the European Union (EU). One of the reasons is that it has been constantly reiterated on various levels,

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[3] Treaty on the Eurasian Economic Union of May 29, 2014 (May 1, 2017), available at https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014.

[4] Смирнов Е.А. О суде [Evgeny A. Smirnov, *About the Court*] (May 1, 2017), available at http://sudevrazes.org/main.aspx?guid=18751.

[5] Евразийская интеграция: роль Суда [*Euroasian Integration: The Role of the Court*] 131 (T.N. Neshataeva (ed.), Moscow: Statute, 2015).

[6] Договор о прекращении деятельности Евразийского экономического сообщества от 10 октября 2014 г. [Treaty on Termination of Functioning of the Eurasian Economic Community of October 10, 2014], Art. 3, Para. 3 (May 1, 2017), available at http://www.consultant.ru/document/cons_doc_LAW_170016/.

[7] Постановление Конституционного Суда РФ от 19 января 2017 г. № 1-П, Российская газета, 3 февраля 2017 г., № 7190(24) [Ruling of the Constitutional Court of the Russian Federation No. 1-P of January 19, 2017, Rossiyskaya Gazeta, February 3, 2017, No. 7190(24)]; Постановление Конституционного Суда РФ от 14 июля 2015 г. № 21-П, Вестник Конституционного Суда РФ, 2015, № 5 [Ruling of the Constitutional Court of the Russian Federation No. 21-P of July 14, 2015, Bulletin of the Constitutional Court of the Russian Federation, 2015, No. 5].

including the highest political ones, that the EAEU follows the best practices of the EU.[8] However, apart from declarations, the EAEU and EU legal orders have similar features indeed, and the EAEU Court has been regularly citing the case-law of the Court of Justice of the European Union (CJEU). Therefore, where necessary, some comparison will be made to the EU.

1. The EAEU Legal Order

From a theoretical perspective, a legal order can be defined as a totality of legal rules regulating a certain community.[9] However, such a totality only constitutes an order if the norms constitute a unity.[10] Moreover, certain hierarchy between legal rules is "[i]nherent in the concept of the legal order."[11] The notion of a legal order was initially primarily associated with states, therefore, with regard to international organizations, which started appearing since the 19th century, it was not immediately clear that they can have their own legal order.[12] Such recognition was developed only in the 20th century, and has only become definitively accepted since 1945.[13] Such a legal order, with a basis in the constituent instrument, is both distinct from the legal orders of Member States and from the international legal order.[14]

Turning to the EAEU, its legal order received the name of the "law of the Union," as it is referred to in the EAEU Treaty. Although the notion is not defined, according to Art. 6 it consists of the EAEU Treaty itself, international agreements in the EAEU framework, international agreements of the EAEU with third parties, as well as decisions and orders of the EAEU institutions. Recommendations, not being obligatory, do not form part of the law of the Union. The major innovation within the law of the EAEU is the principle of direct applicability.[15] In a majority

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[8] *See* Guillaume Van der Loo & Peter Van Elsuwege, *Competing Paths of Regional Economic Integration in the Post-Soviet Space*, 37(4) Review of Central and East European Law 422, 433 (2012). *See also* Roman Goncharenko, *Russia Plans Eurasian Union on EU Model*, DW, December 26, 2011 (May 1, 2017), available at http://www.dw.de/russia-plans-eurasian-union-on-eu-model/a-15615047.

[9] Henry G. Schermers & Niels Blokker, *International Institutional Law: Unity within Diversity* 1140 (Leiden: Martinus Nijhoff Publishers, 2003).

[10] Hans Kelsen, *The Concept of the Legal Order*, 27(1) American Journal of Jurisprudence 64 (1982).

[11] Schermers & Blokker 2003, at para. 1341.

[12] *Id.* Para. 1142.

[13] *Id.*

[14] However, even though the separateness of the legal order of international organizations from the legal order of states is generally accepted, there is more discussion regarding it being separate from the international legal order. *See* on both issues *id.* Para. 1142 and relevant footnotes.

[15] Initially, it was introduced with the establishment of the Commission of the Customs Union in 2011.

of past cases, acts had to be implemented using national procedures in order to have some legal effect. Currently, certain acts do not require any procedures for implementation, so in theory, they become part of national law immediately. The EAEU Treaty gives such effect to decisions of the main regulatory body of the EAEU – Eurasian Economic Commission (hereinafter – Commission), – which are described as acts that have a normative character and are *directly applicable* on the territory of Member States.[16]

However, the overall effect of EAEU law within the national legal orders of Member States is unclear. The EAEU Treaty does not specify the relation of legal force between Union acts and national legislation. The regulation on the Eurasian Economic Commission provides that decisions of the Commission are *binding* on Member States.[17] However, there is nothing on supremacy of Commission decisions over national law. To compare, one of the drafts of the EAEU Treaty had the following provision:

> legal acts of the Union shall be *binding*, shall have *direct applicability* on the territories of Member States, and shall have *priority* over the legislation of Member States.[18]

Therefore, the drafters of the final version of the EAEU Treaty did not only decide to limit themselves to the binding nature of the Commission decisions instead of all EAEU legal acts, but also have decided to exclude the notion of *priority* over national law. This means the final EAEU provisions are limited to the binding character and direct applicability of certain acts, but their legal consequences are not described. This means that priority (or supremacy) is not regulated by the Treaty.

Therefore, formally, there is little space for tensions posed by the EAEU legal order, unless supremacy is introduced into the EAEU Treaty. However, as it is known from the EU practice, supremacy was not defined by the founding treaties, but was established by the European Court of Justice (hereinafter – ECJ) teleologically.[19] Similarly, supremacy could be identified by the EAEU Court, although the ability of the EAEU Court to do a similar job has been diminished as compared to its predecessor:

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[16] Pt. 3 of the Regulation on the Eurasian Economic Commission, Annex 1 to the Treaty on the Eurasian Economic Union of May 29, 2014 (May 1, 2017), available at https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014.

[17] *Id.* Pt. 13, para 1.

[18] Проект договора о Евразийском экономическом союзе [Draft Treaty on the Eurasian Economic Union] (May 1, 2017), available at http://kazenergy.com/ru/2012-09-05-04-11-04/2011-05-13-18-20-44/10777-2013-09-10-07-03-15.html.

[19] *See, e.g.*, Bruno de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order* in *The Evolution of EU Law* 323–362 (P. Craig & G. de Búrca (eds.), Oxford: Oxford University Press, 2011).

it has lost a number of powers, the biggest being the preliminary ruling procedure.[20] However, this could also be done by a joint interpretation of Member States.[21]

Effective functioning of a legal order requires mechanisms for its maintenance and enforcement. Therefore, essential part of the EAEU legal order is the permanent judicial body – the EAEU Court, – since its aim is ensuring uniform application of Union law by Member States and institutions.[22] Although there are doubts that the EAEU Court is able to achieve its aim, a separate judicial authority responsible for the legal order is crucial.[23]

2. The Russian Legal Order vis-à-vis the EAEU Legal Order

The aforementioned description of the EAEU legal order calls for two major inquiries into the relations with the Russian legal order: the effect of EAEU treaties (i.e. the EAEU founding treaty, international agreements concluded in the EAEU framework and international agreements of the EAEU with third parties) and the directly applicable decisions of the Commission.

To start with, Russian participation in the EAEU is based on Art. 79 of the Constitution:

> The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.[24]

This provision talks about Russia's participation in international organizations in a wide sense. It should not be understood as giving a *right* to participate in international organizations, since it is hard to imagine a sovereign country not being able to join an international organization without an explicit provision for such

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[20] Maksim Karliuk, *The Limits of the Judiciary within the Eurasian Integration Process* in *The Eurasian Economic Union and the European Union: Moving toward a Greater Understanding* 171 (A. Di Gregorio & A. Angeli (eds.), The Hague: Eleven International Publishing, 2017).

[21] Pt. 47 of the Statute of the EAEU Court provides that the Court's "clarifications of provisions of the Treaty" do not deprive the Member States of the right for joint interpretation. *See* the Statute of the Court of the Eurasian Economic Union, Annex 2 to the Treaty on the Eurasian Economic Union of May 29, 2014 (May 1, 2017), available at https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014.

[22] *Id.* Pt. 2.

[23] *See* Karliuk 2017. *See also* further in the article.

[24] Конституция Российской Федерации, принята всенародным голосованием 12 декабря 1993 г., Собрание законодательства РФ, 2014, № 31, ст. 4398 [Constitution of the Russian Federation enacted by the national referendum on December 12, 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

a right in its constitution, especially as not all countries have such a provision. This is especially so given the fact that Russia became a member of a number of international organizations prior to the entry into force of the Constitution.[25] Moreover, absence of the explicit "right" to withdraw from an international organization does not mean that the country cannot pursue this option. Therefore, this provision's focus is other than permission. The focus is rather on the transfer of powers and conditions thereof, which will be crucial in further examination. Thus, there are three conditions under which Russia can join an international organization and transfer powers. First, the transfer of powers is only possible by means of an international agreement (ratified by a federal law[26]). Second, such an international agreement cannot limit the rights and freedoms of individuals. Third, the international agreement must not contradict the principles of the constitutional system. Indeed, limitations of transfer of powers are common, e.g. among the countries that joined the EU. Thus, the Danish constitution specifically required that the powers vested in the constitution might only be transferred to a specific extent.[27] In fact, the limited character of transfer was a pre-requisite in the majority of the European countries.[28]

It must be noted that the Russian Constitution and other constitutional norms do not distinguish the EAEU in any respect, which could have given the latter's legal order some additional weight or value. For instance, in the case of the EU, a number of EU Member States, such as Estonia, France, Germany, Latvia and Lithuania make such distinctions.[29] It must be concluded from this that general rules applicable to

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[25] Комментарий к Конституции Российской Федерации [Commentaries on the Constitution of the Russian Federation] (L.V. Lazarev (ed.), Moscow: Novaya pravovaya kul'tura, 2009) (May 1, 2017), also available at http://constitution.garant.ru/science-work/comment/5366634/chapter/3/#block_79.

[26] Федеральный закон от 15 июля 1995 г. № 101-ФЗ "О международных договорах Российской Федерации", Собрание законодательства РФ, 1995, № 29, ст. 2757 [Federal law No. 101-FZ of July 15, 1995. On International Treaties, Legislation Bulletin of the Russian Federation, 1995, No. 29, Art. 2757], Art. 15.

[27] Magdalena M. Martin Martinez, *National Sovereignty and International Organizations* 122 (The Hague: Kluwer Law International, 1996).

[28] *Id.*

[29] *See, e.g.*, Constitution of the Republic of Estonia Amendment Act, September 14, 2003 (May 1, 2017), available at http://www.president.ee/en/republic-of-estonia/the-constitution/. The main provisions are: § 1. Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. § 2. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty. *See also* Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union, July 13, 2004 (May 1, 2017), available at http://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/CONSTITUTIONAL_ACT.pdf. Additionally *see The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)Candidate Countries: Hopes and Fears* (A.E. Kellermann et al. (eds.), The Hague: TMC Asser Press, 2006). *See also* Art. 23 of the Basic Law for the Republic of Germany, Germany 1949 (rev. 2012) (May 1, 2017), available at https://www.constituteproject.org/constitution/German_Federal_Republic_2012?lang=en, and Art. 88 of the Constitution of France, France 1958 (rev. 2008) (May 1, 2017), available at https://www.constituteproject.org/constitution/France_2008?lang=en.

international law and international treaties must be consulted in order to clarify the effect of the EAEU Treaty itself. Art. 15(4) of the Constitution provides:

> The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Based on this provision, it is observed in literature that Russia has adopted the strictest available option of supremacy of rules of international law.[30] According to the above mentioned provision, international agreements form part of the Russian legal system and possess supremacy over national law. It is crucial that the wording chosen for the provision is "part of its legal system" rather than "part of Russian (legislation)," which in certain interpretation could invoke the principle *lex posteriori derogat legi priori*, and future laws could prevail.[31] The second sentence of the provision traces back to the 1992 law amending the 1978 Constitution of the Russian Federation, which, however, established supremacy only with regard to the internationally recognized human rights rules.[32] The Constitutional Court established that international agreements prevail over all national rules, and not only laws.[33] The only exception is the Constitution itself, as "international treaties of the Russian Federation that do not correspond to the Constitution of the Russian Federation, shall not be implemented or used."[34] Thus, if an international agreement establishes rules necessary to change certain provisions of the Constitution, a decision on its obligatory force for Russia

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[30] Исполинов А.С. Статус международных договоров в национальном праве: некоторые теоретические и практические аспекты, 1(94) Российский юридический журнал 191 (2014) [Alexey S. Ispolinov, *A Status of International Treaties in the National Law: Some Theoretical and Practical Aspects*, 1(94) Russian Juridical Journal 191 (2014)]. However, it must be noted that such problem-setting is far from clear, since the whole idea, which can be deduced from such statements, reminds of an approach of a bargaining position regarding how closely one has to follows and respect international law (e.g. in some respect similar to WTO tariff negotiations).

[31] *See more in* Марочкин С.Ю. Действие и реализация норм международного права в правовой системе Российской Федерации [Sergey Yu. Marochkin, *Action and Implementation of International Law in the Legal System of the Russian Federation*] (Moscow: Norma, 2011).

[32] Закон РФ от 21 апреля 1992 г. № 2708-I "Об изменениях и дополнениях Конституции (Основного Закона) Российской Советской Федеративной Социалистической Республики," Российская газета, 1992, № 111 [Law of the Russian Federation No. 2708-I of April 21, 1992. On Amendments and Addenda to the Constitution (Basic Law) of the Russian Soviet Federative Socialist Republic, Rossiyskaya Gazeta, 1992, No. 111]; *See also* Конституция Российской Федерации: доктринальный комментарий (постатейный) [Constitution of the Russian Federation: The Doctrinal Comment (Itemized)] (Yu.A. Dmitrieva (ed.), Moscow: Delovoy Dvor, 2009).

[33] Определение Конституционного Суда РФ от 3 июля 1997 г. № 87-О, Вестник Конституционного Суда РФ, 1997, № 5 [Decision of the Constitutional Court of the Russian Federation No. 87-O of July 3, 1997, Bulletin of the Constitutional Court of the Russian Federation, 1997, No. 5].

[34] Art. 125(6) of the Constitution of the Russian Federation.

is only possible in a form of a federal law after introduction of the corresponding amendments into the Constitution or after the revision of its provisions.[35] The Supreme Court of the Russian Federation has explained that national courts cannot apply national legal rules that are different from the rules established by an international agreement ratified by a federal law – in this case, rules of such an agreement apply.[36] Similarly, the range of international agreements possessing priority over Russian laws is limited to those ratified by a federal law.[37] As a result, the EAEU Treaty is part of Russian national law as well and has priority over its legislation, albeit with certain limitations and although the Treaty itself does not provide for it.

As for decisions of the Commission, which under the EAEU Treaty are directly applicable on the territory of Member States, the situation is less clear from the point of view of Russian constitutional law. Back in 2006 the Economic Court of the Commonwealth of Independent States, performing the duties of the EurAsEC Court,[38] analysed the legislation of EurAsEC Member States and came to the conclusion that there was no national constitutional basis for direct applicability of EurAsEC acts.[39]

However, there are wide disparities between the EAEU Member States in this respect, which range from recognizing Commission decisions as functioning law of the land alongside international treaties (Kazakhstan) to their essentially sublegislative character (Belarus). The Constitution of Kazakhstan states: "…international treaty *and other commitments* of the Republic… shall be the functioning law in the Republic of Kazakhstan".[40] The Constitutional Council of the Republic of Kazakhstan has ruled

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35 Art. 22 of the Law on International Treaties.

36 Постановление Пленума Верховного Суда РФ от 31 октября 1995 г. № 8 "О некоторых вопросах применения судами Конституции Российской Федерации при осуществлении правосудия," Вестник Верховного Суда РФ, 1996, № 1 [Ruling of the Plenum of the Supreme Court of the Russian Federation No. 8 of October 31, 1995. On Certain Issues of Application of the Constitution of the Russian Federation by the Courts during Administration of Justice, Bulletin of the Supreme Court of the Russian Federation, 1996, No. 1], part 5, sec. 2.

37 *Id.*

38 Решение Межгосударственного Совета ЕврАзЭС от 27 апреля 2003 г. № 123 "Об организации функционирования Суда Евразийского экономического сообщества," Информационный бюллетень ЕврАзЭС, 2003, № 5, с. 150 [Decision of the EurAsEC Interstate Council No. 123 of April 27, 2003. On Organization of Functioning of the Court of the Eurasian Economic Community, EurAsEC Information Bulletin, 2003, No. 5, at 150].

39 Консультативное заключение Экономического Суда СНГ от 10 марта 2006 г. № 01-1/3-05 "По запросу Интеграционного Комитета Евразийского экономического сообщества о толковании части второй статьи 1, части первой статьи 14 Договора об учреждении Евразийского экономического сообщества от 10 октября 2000 года" [Consultative Opinion of the CIS Economic Court No. 01-1/3-05 of March 10, 2006. At the Request of the Integration Committee of the Eurasian Economic Community about Interpretation of Articles 1(2) and 14(2) of the Treaty on the Establishment of the Eurasian Economic Community of October 10, 2000] in Решения Экономического Суда Содружества Независимых Государств, 1992–2006 [Decisions of the Economic Court of the Commonwealth of Independent States, 1992–2006] 540 (Minsk: Kovcheg, 2007).

40 Art. 4(1) of the Constitution of the Republic of Kazakhstan. *See* Kazakhstan 1995 (rev. 2011) (May 1, 2017), available at https://www.constituteproject.org/constitution/Kazakhstan_2011?lang=en, emphasis added.

that the obligations of Kazakhstan that stem from decisions of the Commission of the Customs Union (predecessor of the EAEU Commission) fall under the category of "other commitments" under the Constitution.[41]

In the Belarusian legal system, the Constitutional Court of the Republic of Belarus has powers to deliver opinions on the conformity of Commission decisions not only to the Constitution and ratified international agreements, but also to laws and decrees of the President.[42] This is in fact an improvement to the previous situation, where the Constitutional Court could unilaterally find such acts inapplicable,[43] which it cannot do any longer following legislative changes.[44] In any event, Commission decisions are still essentially considered hierarchically lower than laws and decrees of the President.

There are no separate provisions regarding acts of international institutions in Russian constitutional law. However, the Constitutional Court of the Russian Federation delivered a ruling that gives jurisdiction to rule on the constitutionality of decisions of the Commission based on human rights concerns and foundations of constitutional order.[45] This position of the Constitutional Court could serve as a potential source for tensions and the whole idea will be crucial to the discussion that will ensue later in the article.

3. The Eurasian Judiciary

Another source for tensions between the two legal orders could come from direct rulings against the state. However, such instances are rather limited in the EAEU legal order, since in the case of Member States failing to comply with EAEU law, the main regulatory body – the EAEU Commission – cannot any longer refer them to the EAEU Court. The Commission is deprived of such a function, which, however

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41 Нормативное постановление Конституционного Совета Республики Казахстан от 5 ноября 2009 г. № 6 "Об официальном толковании норм статьи 4 Конституции Республики Казахстан применительно к порядку исполнения решений международных организаций и их органов" [Normative Ruling of the Constitutional Council of the Republic of Kazakhstan No. 6 of November 5, 2009. On Official Interpretation of the Norma of Article 4 of the Constitution of the Republic of Kazakhstan with Regard to Procedure of Implementation of Decisions of International Organizations and Their Bodies], part 4 (May 1, 2017), available at http://www.ksrk.gov.kz/rus/resheniya/?cid=11&rid=533.

42 Art. 116(4) of the Constitution of the Republic of Belarus. *See* Belarus 1994 (rev. 2004) (May 1, 2017), available at https://www.constituteproject.org/constitution/Belarus_2004?lang=en.

43 Закон Республики Беларусь от 30 марта 1994 г. № 2914-XII "О Конституционном суде Республики Беларусь" [Law of the Republic of Belarus No. 2914-XII of March 30, 1994. On the Constitutional Court of the Republic of Belarus] (May 1, 2017), available at http://base.spinform.ru/show_doc.fwx?rgn=1947.

44 Закон Республики Беларусь от 8 января 2014 г. № 124-З «О конституционном судопроизводстве» [Law of the Republic of Belarus No. 124-Z of January 8, 2014. On Constitutional Judicial Procedure], Art. 85, paras. 7 & 8 (May 1, 2017), available at http://www.kc.gov.by/main.aspx?guid=21735.

45 Определение Конституционного Суда РФ от 3 марта 2015 г. № 417-О, Вестник Конституционного Суда РФ, 2015, № 3 [Decision of the Constitutional Court of the Russian Federation No. 417-O of March 3, 2015, Bulletin of the Constitutional Court of the Russian Federation, 2015, No. 3].

limited, was available before.[46] If after the Commission's monitoring of compliance with international agreements, there were reasons to believe that one of the parties had not complied with such agreements or Commission decisions, the Commission Council could inform the relevant party and establish a timeframe to address the infringement. If the decision was not complied with, the Commission Council had the right to refer the issue to the EurAsEC Court. The Court could also introduce reasonable interim measures to ensure compliance with the decision or to prevent possible further infringements. The chance of reaching this stage was small since the Commission Council adopted consensus decisions and an infringing Member State could block any such decision. If the issue appeared before the Court, it was not clear what "reasonable interim measures" would look like. Further, if the Court's decision was not complied with, the issue could be referred to the EurAsEC Supreme Council with unanimous decision making. Regardless of these limitations, the Commission could react to the infringements by Member States, which it no longer can. Now, however, in the case of infringements, only Member States can bring actions against other Member States for non-compliance (which is a novelty compared to EurAsEC).

In the EU, there is a comparable supranational procedure in Art. 258 of the Treaty on the Functioning of the European Union (TFEU).[47] Usually, infringements by Member States are in the form of the non-implementation of obligations under EU law or adoption of domestic legal acts, which contravene the obligations within the organization.[48] The existence of an obligatory and exclusive judicial body for these kinds of cases makes the EU different from many other international organizations, and this procedure is the most important tool to ensure the implementation of EU law. The lack of procedure in the EAEU is a return to the common practice in international public law where compliance with international contractual obligations is decided between parties to respective agreements.[49] This does not promote effective judicial control or functioning of the EAEU legal order. Moreover, as many years of EU experience suggest, a Member State rarely brings an action against another Member State to the ECJ, as it is a sign of malevolence and there is the risk of analogous actions against them in the future and Member States prefer political dispute resolution.[50] However, the

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[46] Договор о Евразийской экономической комиссии от 18 ноября 2011 г., Собрание законодательства Российской Федерации, 2012, № 11, ст. 1275 [Treaty on the Eurasian Economic Commission of November 18, 2011, Legislation Bulletin of the Russian Federation, 2012, No. 11, Art. 1275].

[47] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, at 47–390.

[48] Joseph H.H. Weiler, *The Transformation of Europe*, 100(8) Yale Law Journal 2403, 2419 (1991).

[49] Andrew C. Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 European Law Review 443 (1979).

[50] Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* 433 (5th ed., Oxford: Oxford University Press, 2011). However, in the EAEU practice there is already one case brought by one Member State against the other regarding violations of the EAEU Treaty, *see* Постановление Большой коллегии

actions brought by the European Commission against Member States are common and Member States tend to comply with the decisions of the ECJ against them.[51]

In any event, this will considerably limit challenges against Member States, and there will be less direct pressure on the part of the EAEU Court towards the Russian legal order. However, this does not mean absence of tensions between the legal orders. In fact, the increased ability of Member States to get away with non-implementation of obligations emanating from the EAEU legal order will create tensions which could remain unaddressed and could build up.

Another procedure that helps eliminating attempts of Member States to circumvent certain legal obligations is the preliminary ruling. It is done by Member States' actions being challenged in their own national courts. This procedure is a system of judicial oversight within the judicial systems of Member States in cooperation with an organization's court. When the issue of interpretation of law of the organization appears before a national court, such a court can stay the case and make an inquiry to the court of the organization for an interpretation. In the EU, when a national court is the court of final instance, it is obliged to refer to the ECJ with such an inquiry.[52] After the ruling is delivered, it is sent back to the national court, which rules on the case in hand. Therefore, national courts and the organization's court are integrated into a single system of judicial oversight. In the EurAsEC Court the preliminary ruling procedure, however limited, was available. Even though it was used only once there,[53] EU practice suggests that the ECJ and the national courts of EU Member States use this procedure regularly.[54] Through this procedure, individuals become, to a certain extent, agents monitoring Member States' compliance with EU legal obligations.[55]

The goal of the EU preliminary ruling procedure is similar to the whole mission of the EAEU Court, which is to preserve the uniform interpretation of the law and the effective functioning of the legal order itself. However, this procedure also goes

Суда Евразийского экономического союза от 12 сентября 2016 г. [Ruling of the Eurasian Economic Union Grand Chamber of September 12, 2016] (May 1, 2017), available at http://courteurasian.org/doc-16453.

51 *See* Alec Sweet & Thomas Brunell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106(1) American Political Science Review 204 (2012).

52 Art. 267 of the TFEU.

53 Решение Большой коллегии Суда Евразийского экономического сообщества от 10 июля 2013 г., Бюллетень Суда Евразийского экономического сообщества, 2013, № 2, с. 7 [Decision of the EurAsEC Court Grand Chamber of July 10, 2013, Bulletin of the Court of the Eurasian Economic Union, 2013, No. 2, at 7].

54 Court of Justice of the European Union Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal, at 72 (May 1, 2017), available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/en_ra14.pdf. Altogether 8710 references for a preliminary ruling, which is almost equal to all direct actions (8901).

55 Weiler 1991, *supra* note 48.

beyond that stated purpose to also protect individual rights. Through this procedure, the national courts of EU Member States and the CJEU are integrated into one system of judicial supervision. Even when there are limits of direct access of individuals to the CJEU, the supremacy and direct effect of EU law enables any individual or organization to challenge the actions of their own Member States using EU law.

This procedure has been abolished with the advent of the EAEU. The removal of the preliminary ruling procedure in the EAEU Court disintegrated national courts from the Eurasian judicial system. This will inevitably lead to differing practices and make the job of the EAEU Court to ensure the uniform application of Union law extremely difficult. The disintegration of the judicial system can become a source of disparities and eventual tensions. The procedure that could compensate for the lack of the preliminary ruling procedure is the ability of Member States to assign state bodies (including courts) to request clarification from the EAEU Court.[56] Leaving the issue of access to judicial interpretation in the hands of Member States is not reassuring. However, practice will show the viability of this measure.

There are many reasons why Member States would want to limit the powers of the EAEU judiciary. One of them is the activist attitude taken by the previous EurAsEC Court from the very start, borrowing from the ECJ.[57] The court's practices even lead Ispolinov to describe it as a "new-style institution of international justice".[58] He claims that one of its very first judgments – *Yuzhnii Kuzbass*[59] – was the first case of judicial activism in the post-Soviet space.[60] In this case, treaty interpretation was more extensive than the textual provisions suggest. In particular, while the relevant EurAsEC legal acts did not explicitly provide the EurAsEC Court with powers to declare the Commission's decisions void, the Court decided otherwise. It declared the Commission's decision void, decided on the time when it became void, and made the judgment applicable not only to the parties of the dispute, but *erga omne*. Following that, it is probably not surprising that the new EAEU Court has been explicitly banned from deciding on such issues, and the Commission's decisions remain in effect until the Commission implements the ruling.

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56 Pt. 49 of the Statute of the EAEU Court.

57 About judicial activism of the Court of Justice *see* Mark Dawson et al., *Judicial Activism at the European Court of Justice* (Cheltenham and Northampton, Mass.: Edward Elgar Publishing, 2013).

58 Alexey Ispolinov, *First Judgments of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement*, 40(3) Legal Issues of Economic Integration 225 (2013).

59 Постановление Большой коллегии Суда ЕврАзЭС от 8 апреля 2013 г., Бюллетень Суда Евразийского экономического сообщества, 2013, № 1, с. 47 [Ruling of the EurAsEC Court Grand Chamber of April 8, 2013, Bulletin of the Court of the Eurasian Economic Union, 2013, No. 1, at 47].

60 Исполинов А.С. Решение Большой Коллегии Суда ЕврАзЭС по делу Южного Кузбасса: насколько обоснован судейский активизм?, 5(60) Евразийский юридический журнал 22 (2013) [Alexey S. Ispolinov, *Decision of the Grand Chamber of the Court of the Eurasian Economic Community in the Case of Yuzhniy Kuzbass: To What Extent Judicial Activism is Justified?*, 5(60) Eurasian Law Journal 22 (2013)].

These examples show that there are also indirect ways for the EAEU Court to prescribe actions. Decisions of this kind in the future could be a source for tension with the Russian legal order, since it is ensured by its national judicial system. The procedures via which such indirect tensions can appear are multiple. The Statute of the EAEU Court establishes that the Court can adjudicate on issues raised about implementation of EAEU law upon request of a Member State or an economic entity.[61] Member States can also raise issues concerning compliance of international agreements within the Union with the EAEU Treaty, compliance of other Member States with the law of the Union, compliance of decisions of the main regulatory body Eurasian Economic Commission (with the law of the Union, and challenge an action (inaction) of the Commission).[62] The EAEU Court has retained the procedure established within the EurAsEC Court, where economic entities, including foreign ones, can raise issues of compliance of a Commission's decision that directly affect their economic rights, with the EAEU Treaty and (or) international agreements within the Union. The same can be done regarding an action (or lack thereof) of the Commission.

4. The Interrelations of the Judiciaries

The ultimate changes in the powers of the EAEU Court are likely a way to address tensions that have already happened and to prevent future ones. Judicial activism as such, even though potentially irritating for Member States, is not something that could promote such tremendous changes as removing the preliminary ruling procedure altogether. However, if such activism is not well grounded and involves direct confrontation – that could be more than irritating. An example of the first (and the last) preliminary ruling action could serve as an illustrative example. The request for the preliminary ruling was made by the Supreme Economic Court of Belarus. However, it almost immediately withdrew the request. Nevertheless, the EurAsEC Court decided to open the proceedings as it had a right to do so.[63] However, the EurAsEC Court's argument was peculiar:

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61 The EAEU Treaty defines an "economic entity" or "market participant" as a "commercial organization or a non-profit organization operating with generation of profit, an individual entrepreneur, as well as a natural person whose professional income-generating activities are subject to state registration and/or licensing under the legislation of the Member States" (pt. 2(20) of the Protocol on General Principles and Rules of Competition, Annex 19 to the Treaty on the Eurasian Economic Union of May 29, 2014 (May 1, 2017), available at https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014).

62 Pt. 39 of the Statute of the EAEU Court.

63 Регламент Суда Евразийского экономического сообщества, утвержденный Решением Суда ЕврАзЭС от 12 июля 2012 г. № 21 [Regulations of the Court of the Eurasian Economic Community, adopted by the Decision of the Court of the Eurasian Economic Community No. 21 of July 12, 2012], Art. 37(1)(v) (May 1, 2017), available at http://www.consultant.ru/document/cons_doc_LAW_132785/.

> as if decided otherwise it would not meet the requirements of procedural economy and might lead to an unjustified delay in adjudication of the case.[64]

It is very unclear how exactly procedural economy would be affected and why would a delay take place at all. It has been suggested in a text co-authored with one of the judges involved in the case, that this approach was taken from the ECJ's Rules of Procedure (a draft back then).[65] Indeed, one can only understand the EurAsEC Court's statement in light of the explanation given by the drafters of the ECJ's Rules of Procedure, and particularly the following norm (in the formulation of the final version of the Rules of Procedure):

> The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served on the interested person...[66]

This provision provides for a right to deliver a judgment notwithstanding a withdrawal of a request for a preliminary ruling. The drafters explain this provision in terms of procedural economy "since a number of similar cases may have been stayed, either by the [ECJ] or by national courts or tribunals, pending the forthcoming judgment."[67] In that case not delivering a judgment could lead to dealing with every case that has been stayed, which would cause a delay in the progress of those cases. However, the drafters underlined that such a withdrawal must happen "at a very advanced stage of the proceedings, when the date of delivery of the judgment has been communicated" and when "the [ECJ's] deliberations will have been completed." Conversely, in the case of the EurAsEC Court, the withdrawal request was made at an early stage only two weeks after the request for preliminary ruling was accepted.[68] As it has been noted in the dissenting opinion of judge Smirnov, there was no proof of similar cases stayed in national courts, pending the forthcoming judgment; and no proof that the proceedings before the Supreme Economic Court of Belarus could

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64 Decision of the EurAsEC Court Grand Chamber of July 10, 2013, *supra* note 53, at 11.

65 *Euroasian Integration*, *supra* note 5, at 179.

66 Consolidated version of the Rules of Procedure of the Court of Justice of September 25, 2012, OJ L 265, 29.9.2012, as amended on June 18, 2013, OJ L 173, 26.6.2013.

67 *See* comments to Art. 101 in the Draft Rules of Procedure of the Court of Justice of May 25, 2011 (May 1, 2017), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/en_rp_cjue.pdf.

68 The request for preliminary ruling was accepted by the EurAsEC Court on April 22, 2013, the applicant withdrew the request on May 6, *see* Decision of the EurAsEC Court Grand Chamber of July 10, 2013, *supra* note 53, at 7. The applicant repeatedly requested a withdrawal on June 21, 2013, *see* the dissenting opinion of judge Smirnov of July 10, 2013 in Case 1-6/1-2013 on file with the author.

be delayed.[69] Claims, such as lack of explanation of the withdrawal request, that the EurAsEC Court had already involved a number of experts, etc. do not seem to be quite enough. Therefore, it is more likely that the Court, having had the very first preliminary ruling request, wanted to seize the opportunity and establish its authority at any cost. A number of activist provisions in the final ruling (e.g. that the ruling was "directly effective" on the territory of all Member States) only confirms this position.

Therefore, an assertive attitude of the EAEU Court coupled with the overreaction of the Member States have led to tensions that have resulted in drastic reduction of powers of the EAEU Court. This has eventually led to the situation where national courts have been left completely disintegrated from the Eurasian judicial system, while an essential part of the ability of the EAEU Court to ensure the functioning of the EAEU legal order is the way national judiciary perceive the EAEU Court's authority.

In this respect it is important to turn to the Russian Constitutional Court, which has already voiced its differences in approaches with the Eurasian judiciary. Thus, there are challenges to the interpretative role, e.g. according to the Constitutional Court, on the Russian soil, the norms of the Customs Code of the Customs Union, which have become part of EAEU law, should be implemented according to its own interpretation.[70] Further, there are different approaches to retroactive applications of Commission decisions.[71] Although, the Constitutional Court does not directly state the wrongness of the Eurasian judiciary, it can be deduced from the Constitutional Court's reasoning, that in certain cases, positions of the Eurasian judiciary should only be taken into account by national courts, rather than complied with.[72] Essentially, such challenges are based on concerns regarding human rights and foundations of the constitutional system, which brings us to a different dimension of source for tension.

The direct and indirect sources for tensions have been a recurring topic throughout the article. The same goes to the Russian judiciary and the Constitutional Court as the major institution therein. The tensions can come not only through direct confrontation with the EAEU Court, but through a certain line of case-law involving other external judicial authorities. First and foremost this concerns the jurisprudence of the Russian Constitutional Court concerning ECtHR decisions. The

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69 Dissenting opinion of judge Smirnov of July 10, 2013 in Case 1-6/1-2013, at 3.

70 *See* Определение Конституционного Суда РФ от 2 июля 2013 г. № 1050-О [Decision of the Constitutional Court of the Russian Federation No. 1050-O of July 2, 2013] (May 1, 2017), available at http://doc.ksrf.ru/decision/KSRFDecision136123.pdf.

71 Decision of the Constitutional Court of the Russian Federation No. 417-O of March 3, 2015, *supra* note 45.

72 *Id.*

most recent case is the Yukos decision,[73] which has seen the Constitutional Court establishing impossibility to implement the 2014 ECtHR judgment finding Russia in violation of its obligations under the ECHR and requiring it to pay a considerable sum to Yukos shareholders.[74] However, essential preconditions for the ruling have been set out in another ruling of the Constitutional Court concerning implementation of ECtHR judgements as such,[75] which has been followed by a respective law.[76] According to that ruling, the Constitutional Court maintains that Russia can set aside international obligations if it is the only option to prevent the violation of principles and norms of the Russian Constitution. When formulating its own position, the Constitutional Court heavily relied on the rulings of the constitutional authorities of Germany,[77] Italy,[78] Austria,[79] and the UK,[80] which were quite critical of the ECtHR. However, the Constitutional Court also went beyond that. First, the Constitutional Court referred to the Vienna Convention on the law of treaties, in particular Art. 31(1) which establishes that a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[81] Following this provision, the Constitutional Court claimed that an international treaty is obligatory to the parties in the meaning, which could be understood using this rule of interpretation. The court continued, that if the ECtHR, when interpreting a provision of the European Convention on

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73 Постановление Конституционного Суда РФ от 19 января 2017 г. № 1-П [Ruling of the Constitutional Court of the Russian Federation No. 1-P of January 19, 2017] (May 1, 2017), available at http://www.consultant.ru/document/cons_doc_LAW_211287/.

74 *OAO Neftyanaya Kompaniya YUKOS v. Russia*, no. 14902/04, ECHR 2014.

75 Постановление Конституционного Суда РФ от 14 июля 2015 г. № 21-П [Ruling of the Russian Federation Constitutional Court No. 21-P of July 14, 2015] (May 1, 2017), available at http://www.consultant.ru/document/cons_doc_LAW_182936/.

76 Федеральный конституционный закон от 14 декабря 2015 г. № 7-ФКЗ "О внесении изменений в Федеральный конституционный закон 'О Конституционном Суде Российской Федерации'", Собрание законодательства Российской Федерации, 2015, № 51 (ч. 1), ст. 7229 [Federal Constitutional Law of the Russian Federation No. 7-FKZ of December 14, 2015. On Amending the Federal Constitutional Law on the Constitutional Court of the Russian Federation, Legislation Bulletin of the Russian Federation, 2015, No. 51 (part 1), Art. 7229].

77 GFCC, Order of the Second Senate of October 14, 2004 – 2 BvR 1481/04 (regarding *Gorgulu v. Germany*, no. 74969/01 ECHR 2004); BVerfG, 29.05.1974 – 2 BvL 52/71 *Solange I*.

78 Judgment Corte Costituzionale of November 19, 2012 no. 264/2012 (regarding *Maggio and others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08 ECHR 2011); (regarding *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of February 3, 2012, 2012 ICJ Rep. 99).

79 VfGH decision of October 14, 1987, B 267/86.

80 Judgment of October 16, 2013 UKSC 63 (regarding *Hirst v. the United Kingdom (No. 2)*, no. 74025/01 ECHR 2005).

81 Art. 31(1) of the Vienna Convention on the Law of Treaties of May 23, 1969, 1155 UNTS 331.

Human Rights, attributes to a term a meaning different from an ordinary one, or if it interprets contrary to the object and purpose of the Convention, a state gets a right to refuse to implement a judgement against it as going beyond the obligations voluntarily accepted when ratifying the Convention. This is a far reaching statement, which presupposes the ability to set aside not only interpretations of international courts, but international obligations in general. It can easily be used with regard to interpretations made by the EAEU Court in the future.

But the Constitutional Court went further, stating that a judgment of the ECtHR cannot be considered obligatory if an interpretation of a provision of the Convention, made in defiance of the general rule of interpretation, would disagree with the imperative norms of general international law (*jus cogens*). The Constitutional Court considers sovereign equality and related rights, as well as non-interference into domestic matters as "undoubtedly" norms *jus cogens*.

There are several issues with this point of view. It is not entirely clear if the interpretation violating *jus cogens* is a special case of possible "wrongful" interpretations, particularly relevant for the case in hand, or the only one. Either way, sovereignty and non-interference, if considered as part of *jus cogens*, could be interpreted quite broadly. The norms of *jus cogens* are far from clear in international law.[82] Even so, sovereign equality and non-interference are not usually listed as part of *jus cogens*. Generally speaking, it remains a mystery why the *jus cogens* argument was made at all. To some extent is reminiscent of the *Kadi* case, where the General Court of the EU tried to use the *jus cogens* argument, which was eventually ignored by the CJEU.[83]

The ECtHR, being a court whose primary concern is human rights, is under pressure from the Constitutional Court of the Russian Federation exactly about the protection of human rights. Ironically enough, the EAEU Court, not having a catalogue of human rights to rely on in the first place, is under particular pressure for possible violations of human rights. Therefore, the Constitutional Court has even more space for manoeuvre to disregard the EAEU Court and, eventually, the EAEU legal order.

Conclusion

This analysis shows that there are a number of sources for possible tensions between the legal orders of the EAEU and Russia. Some of the developments have already scratched the surface of such tensions.

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[82] *See, e.g.*, Alexander Orakhelashvili, *Peremptory Norms in International Law* 40 (Oxford: Oxford University Press, 2008).

[83] Judgment of September 30, 2010 in Case T-85-09 Kadi v. Commission, [2010] ECR II-5177; Judgment of July 18, 2013 in Joined Cases C-584-10, C-593-10 and C-595-10 Commission and others v. Kadi Appeal [2013] ECLI:EU:C:2013:518. More on Kadi cases see Kadi on Trial: A Multifaceted Analysis of the Kadi Trial (M. Avbelj et al. (eds.), London and New York: Routledge, 2014).

On the one hand, sources for tensions are not immediately evident given the absence of the express notion of supremacy of EAEU law, international law-friendly provisions of the Russian Constitution, little possibilities for the EAEU Court to rule directly against Member States, generally limited powers of the EAEU Court and a rather positively careful approach of the Russian Constitutional Court towards the jurisprudence of the EAEU Court. On the other hand, some of the exact same reasons can be looked at from another side and become sources for tensions. Thus, the indeterminacy of the issue of supremacy could be interpreted differently by the Eurasian judiciary and national judiciaries. Also, the fact of little possibilities for the EAEU Court to rule directly against Member States, as well as diminished powers of the EAEU Court coupled with overall disintegration of national and Eurasian judiciary, could lead to widely different approaches, interpretations and practices in applying EAEU law. This might result in legal conflicts throughout the EAEU.

Apart from that, there are indirect dangers stemming from the case-law of the Russian Constitutional Court. The Constitutional Court, using rather weak arguments, has established the possibility for Russia to set aside international obligations. Ironically, an argument essentially based on human rights, is used against the human rights authority – the ECtHR – the court whose primary function is to protect human rights. In this context the position of the EAEU Court, which does not even have a catalogue of human rights to rely upon, is rather weak against the Constitutional Court.

To address these issues and reduce possibilities for tensions one has to go back to the inception of the EAEU legal order, and recall the role Russia played in shaping it as a founding member. The Eurasian integration developed within a narrative largely shaped by Russia and its legal order. Hence, to continue shaping it further, actors within the Russian legal order, primarily the Constitutional Court, must play a constructive role. The EAEU Court, in its turn, must be similarly constructive rather than overly assertive in establishing its authority; and it should be by no means precluded, either through the diminished powers or by other means, from guiding the development of the legal order.

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THE COURT OF THE EURASIAN ECONOMIC UNION: CHALLENGES AND PERSPECTIVES

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The Court of the Eurasian Economic Union (EAEU Court) is a new structure operating since 2015, and whose mission is to ensure the uniform interpretation and application of EAEU law. The article focuses on the main challenges the Court is presently facing: limited competence; a lack of procedural mechanisms to ensure the dissemination of its case-law among national courts; and a low number of applications. Consequently, it is divided into three sections.

The first section is devoted to an analysis of the Court's competence and focuses on the loss of the preliminary reference procedure that existed under the EurAsEC law. The authors analyze its role and the possibility of compensating for its lost powers.

The second section explores the other tools available to the Court in order to influence the case-law of national courts indirectly. It explores the practical difficulties which economic entities face when bringing parallel proceedings before the EAEU Court and a national court, or when trying to obtain a review of a national court judgment following a positive outcome in the EAEU Court.

The third section tackles the issue of the low number of applications, linked to a lack of trust from the business and legal communities. Thus, it is vital for the Court to earn a reputation based on accessibility, professionalism and efficiency. To this end, the authors analyze such issues as the duration of proceedings, the locus standi of economic entities and the way in which judgments should be drafted to ensure the protection of rights and legitimate interests of economic entities.

Keywords: Court of the Eurasian Economic Union; Eurasian integration; EAEU' Russian civil procedural law; Court of Justice of the European Union.

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Introduction

The Court of the Eurasian Economic Union (EAEU Court) is a relatively new structure operating since 2015. After the termination of the Eurasian Economic Community (EurAsEC) in connection with the launch of a more advanced integration association – the Eurasian Economic Union, the Member States decided not to reform the EurAsEC Court but to create an entirely new institution.

Such a decision might have been prompted not only by the intent to substantially review the competence and operation of the Court through drafting a new Statute and Rules of Procedure[1] but also by the desire of some of the Member States to appoint new judges and to get more control over their appointment and dismissal.

The lack of a legal succession between the two institutions has two major consequences. First, it limits the jurisdiction *ratione temporis* of the new Court to the disputes arisen after January 2015. Secondly, it allows the new Court to distance itself from the case-law of the EurAsEC Court. While in the judgment of the Chamber in the *General Freight* case[2] the Court stated that legal positions formulated in the judgments of the Court of the Eurasian Economic Community may be used as *stare*

[1] The Rules of Procedure of the EurAsEC Court have been drafted by the Court itself.

[2] Case No. CE-1-2/2-16 *General Freight CJSC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-15563.

decisis,[3] it should be noted that this judgment remains the only instance where the EurAsEC Court's case-law was quoted even though the EAEU Court is often reproducing the same legal positions.

The mission of the new Court is to ensure the uniform interpretation and application of the EAEU law. In fulfilling this objective, the Court is facing three main challenges: a limited competence, the lack of procedural mechanisms to ensure the dissemination of its case-law among national courts and a relatively small number of applications from economic entities.

1. A Limited Competence: Myths and Realities

Among the challenges the EAEU Court is facing, one of the most important is still its limited competence set in Chapter IV of the Statute of the EAEU Court (hereinafter – Statute).[4] The jurisdiction of the Court can be divided into two blocks. First of all, the Court has the competence to resolve disputes brought by Member States or economic entities. Secondly, the Court has competence to consider applications for clarification of EAEU law provisions brought by Member States, bodies of the Union or EAEU civil servants. The fundamental difference between these two categories is that applications concerning disputes lead to judgments that are binding.

According to the judgment of the Grand Chamber of the EurAsEC Court in the *Yuzhny Kuzbass* case,[5] the judgments of the EurAsEC Court were binding not only on the parties to the disputes, but *erga omnes*.

Although pursuant to paras. 99 and 100, after consideration of the disputes, the Court shall deliver a judgment that shall be obligatory for execution by the parties to the dispute (in cases submitted by Member States) or by the Commission (in cases submitted by economic entities), the wording of this provisions (the absence of the word "only") does not prevent the legal positions established by the Court in the analytical part of the judgment from being binding *erga omnes*. Thus, there are no reasons why the EAEU Court should depart from the position of the EurAsEC Court in the *Yuzhny Kuzbass* case. This conclusion is confirmed by the position of the Supreme Court of the Russian Federation expressed in Plenary Ruling of May 12, 2016 No. 18 "On Certain Questions of the Application of Customs Legislation."[6]

In para. 39 of the Statute, the types of disputes the Court is competent to consider are classified according to the persons who can bring them. For the sake of clarity,

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[3] Subpara. 10 of "Legal Context" section of the judgment of the Chamber of the Court in the case *General Freight CJSC v. Commission*.

[4] Annex 2 to the EAEU Treaty.

[5] Case No 1-7/1-2012 *Yuzhny Kuzbass OJSC v. Commission* (May 1, 2017), available at http://courteurasian.org/page-20811.

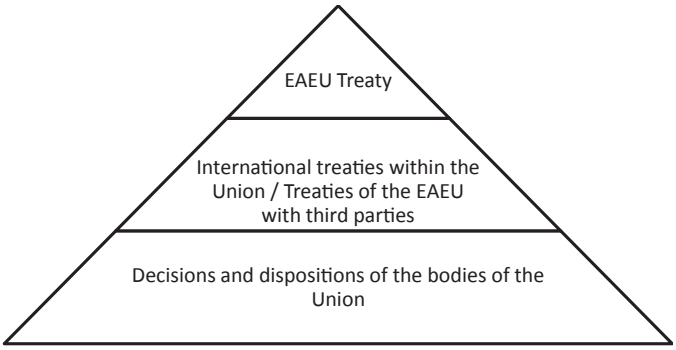
[6] Para. 3, subpara. 2.

we would like to suggest a different classification based on the type of action. Before doing so, however, it is necessary to give some preliminary remarks.

First of all, one has to keep in mind the specific structure of EAEU law as determined by Art. 6(1) of the EAEU Treaty.

The primary law is formed by three types of international treaties: the Treaty on the Eurasian Economic Union, which is the founding treaty establishing the main principles and setting up the bodies of the EAEU; international treaties within the EAEU (some of them dating back to the Customs Union[7]), and, finally, treaties between the EAEU and third parties.[8] According to Art. 6(2) of the EAEU Treaty, International treaties of the Union with a third party shall not contradict the basic objectives, principles and rules of the Union operation. The fact that these objectives, principles and rules are mainly established by the Treaty and that the compliance of treaties concluded within the EAEU may only be assessed vis-à-vis the Treaty[9] and not vis-à-vis international treaties with third parties suggest that there is no predetermined hierarchy between the EAEU treaties with third parties and international treaties within the Union. At the same time, there are no mechanisms like the one existing in the EU[10] which could ensure a judicial control over the compliance of international treaties with third parties with the EAEU Treaty.

The secondary law is composed by the decisions and orders of the EAEU bodies – the Supreme Eurasian Economic Council (hereinafter – Supreme Council), the Eurasian Intergovernmental Council and the Eurasian Economic Commission (hereinafter – Commission).



7 For instance, the Customs Code of the Customs Union which is to be replaced by the EAEU Customs Code.

8 For instance, the Free Trade Agreement with Vietnam.

9 Para. 39(1) of the Statute.

10 Art. 218(11) of the Treaty on the Functioning of the European Union (TFEU) provides that "a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

Secondly, it must be born in mind that the Court does not have the competence to declare a Commission's decision or an international treaty within the Union invalid. This follows directly from para. 102 of the Treaty according to which "a judgment of the Court cannot amend and (or) abrogate the existing rules of the law of the Union, of the legislation of the Member States, and cannot create new ones". Thus, the Court may only declare a Commission's decision "not in line with the Treaty or international treaties within the Union." According to para. 111, a decision of the Commission or its particular provisions declared by the Court not in line with the Treaty and (or) international treaties within the Union shall continue to be valid after the entry into force of the corresponding judgment of the Court until the execution of the said judgment by the Commission within the time-limit prescribed by the Court.[11] Therefore, challenges directed against Commission decisions take the form of actions "concerning the compliance" of the said acts with the EAEU Treaty or international treaties within the EAEU. Likewise, the Court has the competence to assess the compliance of international treaties within the EAEU with the Treaty.

1.1. The Current Judicial Remedies in the EAEU Court

Actions (applications to resolve disputes and requests for clarification) can be classified into five categories:

a. Actions "concerning the compliance of an international treaty within the Union or its particular provisions with the Treaty." They may be brought by Member-States only. This type of action has not been submitted to the Court yet and raises some questions. First of all, a direct action supposes that there is at least one plaintiff and one defendant. One could suppose that the defendant could be the Supreme Council as international treaties within the Union are signed during its meetings. However, we have to rule this hypothesis out – international treaties may not be regarded as acts of the Council as they are signed by Member States. Thus, the Supreme Council in this instance serves as a mere platform for heads of states to meet. Besides, according to para. 43 of the Statute, "any dispute may be accepted for consideration by the Court only following a prior recourse of an applicant to a Member State or the Commission to settle the matter within the pre-trial procedure." Thus, only Member States may be the defendants in this type of action. Secondly, it is not entirely clear what will be the consequences of a judgment of the Court declaring a certain provision of an international treaty within the EAEU not in line with the EAEU Treaty. We can suppose that due to the principle of primacy, the Commission or national bodies (including the courts) will be no longer able to apply the international treaty, while Member States, under the principle of loyal cooperation, will have the duty of renegotiating the international treaty within the EAEU unless they choose to amend the EAEU Treaty instead.

[11] In case of absence of such a prescription a default time-limit of 60 days shall apply.

b. Actions "concerning the compliance of a decision of the Commission or its particular provisions with the Treaty, international treaties within the Union." This type of action may be submitted by Member States[12] but also, subject to certain requirements, by economic entities.[13] The difference between the type of applications appears not only in a stricter *locus standi* for economic entities, but also in the fact that Member States may also ask the Court to assess the compliance of the Commission decisions vis-à-vis decisions of the bodies of the Union. This could be explained by the fact that decisions of the Supreme Council or the intergovernmental council are not directly applicable and capable of having direct effect. On the other hand, strict wording used in the Statute does not prevent the applicants from invoking other rules of law relating to the application of the Treaty or treaties within the EAEU provided they have a direct effect such as international treaties between the EAEU and third countries or even, under certain conditions, treaties concluded by EAEU Member States with third parties. Indeed, in the *General Freight* case[14] the Court concluded that the Convention on Harmonized System "shall be applied along with the Union law to regulate the customs and tariff relations within the EAEU."[15] Likewise, nothing prevents the applicants from invoking other grounds to challenge the Commission's decision such as lack of competence, infringement of substantive procedural requirements or misuse of powers. Indeed, according to Art. 45(a) of the Rules of procedure, in this type of action the Court "shall verify the competence of the Commission to adopt the contested decision." The Court gave a broad interpretation of this requirement in the *Sevlad* case[16] by stipulating that it also needs to check whether the Commission has respected essential procedural requirements.[17]

c. Challenges of actions or inaction of the Commission. This type of action is very similar to the challenges directed against Commission's decisions and may be submitted by either Member States or economic entities. It should be noted that unlike the EU where the action for failure to act constitutes a separate type of action[18], the Statute of the Court does not make a distinction between the challenge of actions, and the challenge – for failure to act in the EAEU Court do not constitute a separate kind of action.

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12 Para. 39(1), alinea 3 of the Statute.

13 Para. 39(2), alinea 1 of the Statute.

14 *General Freight CJSC v. Commission*, *supra* note 2.

15 *See* subparas. 5, 7–9 of "Legal Context" section of the judgment of the Chamber of the Court; para. 5.1.1, subparas. 13–15 of the judgment of the Appeals Chamber of the Court.

16 Case No. CE-1-2/1-16-KC *Sevlad LLC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-15463, http://courteurasian.org/doc-15893.

17 *See* para. 7.1.2, subpara. 1 of the Judgment of the Chamber in the case *Sevlad LLC v. Commission*.

18 Governed by Art. 265 of the TFEU.

Thus, it was logical that the Court of the EAEU chose a broad interpretation of inaction in the *Tarasik* case.[19] It should be noted that "in general 'improper failure to act' means a non-performance or improper performance by a supranational body (official) of the duties assigned to it by the Union law, in particular leaving a request from an economic entity without consideration in whole or in part, a response to the applicant not on the merits of his request, if the consideration of this request falls within the competence of a supranational body (official)."

The Court went even further by stating that a negative response of the Commission may also be contested as part of a claim regarding a failure to act "if the performance of the action requested by the applicant constitutes its direct duty, which cannot be delegated to other persons (the so-called 'special duty')." In doing so, it clearly preferred to follow the approach of national courts[20] over the one of the CJEU. It should be reminded that in the CJEU once the institution comes with a clear position (even when it is a negative reply), the action has to be discontinued even if the institution gave the reply in the course of judicial proceedings. This makes the action for failure to act a mostly ineffective judicial remedy – just a necessary preliminary step before submitting an action for annulment. Contrary to the affirmations of some scholars, the Court did not wrongly interpret the case-law of the CJEU but made a deliberate choice to depart from this narrow reading of "inaction." The reference to an early judgment of the CJEU[21] was illustrative of the broad approach chosen by the Court even if it does no longer reflect the case-law of the CJEU.

d. Actions for failure to fulfil obligations. This type of action[22], which could have only been submitted by the Commission in the EurAsEC Court, may now be submitted by Member States alone. This change significantly reduced the capacity of the Commission responsible for monitoring and controlling the application of EAEU law, and capable to apply pressure on reluctant Member States. This is symptomatic of an overall lack of trust in the supranational institutions. We still consider that for Member States sending a complaint to the Commission might have been a more preferable option rather than having to institute proceedings themselves. Accordingly, the low number of such actions does not come as a surprise. The first action for failure to fulfil obligations currently pending has been introduced by the

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19 Case No. CE-1-2/2-15-KC *Tarasik K.P. v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-14443.

20 Постановление Арбитражного суда Северо-Кавказского округа от 27 июля 2015 г. по делу № А32-31511/2012 [Resolution of the Federal Court of Arbitration of the North Caucasian District No. A32-31511/2012 of July 27, 2015].

21 Case C-302/87 *European Parliament v. Council of the European Communities*, 1988, ECR 05615.

22 In the Statute, they are referred to as actions "concerning the observance by another Member State (other Member States) of the Treaty, international treaties within the Union and (or) decisions of the bodies of the Union, as well as particular provisions of the said international treaties and (or) decisions."

Russian Federation against the Republic of Belarus and relates to the transit of goods from Kaliningrad to the rest of the Russian territory via Belarus.

e. Requests for clarification. Requests for clarification of provisions of the Treaty, international treaties within the Union and decisions of the bodies of the Union may be submitted either by Member States, bodies of the Union or employees and officials of the bodies of the Union and the Court.[23] In the last case, they may only concern labour relations. We have to note that among the bodies of the Union, only the Commission is likely to address such requests, as neither the Supreme Council nor the Intergovernmental Council are permanent institutions and the function of their secretariat is currently performed by the Commission.

While the advisory opinions of the Court are not legally binding and do not deprive the Member States from the right of jointly interpreting the Treaty or international treaties within the Union, this instrument can still be an effective instrument as will be discussed in the next chapter.

1.2. References for Preliminary Rulings in the EurAsEC Court

Unlike its predecessor – the EurAsEC Court – the EAEU Court has no jurisdiction to give preliminary rulings concerning the application of the Treaty, international treaties within the Union, or Commission decisions following references made by national courts. All researchers are unanimous in their negative assessment of this change in the Court's powers,[24] pointing out that "it may prove a serious obstacle on the path of establishing the EAEU's legal order; it narrows the Court's field of action, while undermining confidence in its authority and legitimacy from both the perspective of national courts and potential applicants," and further that "it will impair upholding of a uniform interpretation of the EAEU law and subsequent integration efforts."[25]

The actual situation, however, seems to be less dramatic. Firstly, the role played by preliminary rulings in the interaction between the EurAsEC Court and the national courts should not be overestimated. Secondly, we believe there are mechanisms to at least partially recover the powers lost by the Court.

Any supreme judicial authority could request the EurAsEC Court to render an opinion regarding the application of international treaties of the Customs Union and acts of the Commission of the Customs Union, provided that the two following requirements were met:

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[23] Para. 46 of the Statute.

[24] *See, for instance*, Кембаев Ж.М. Сравнительно-правовой анализ функционирования Суда Евразийского экономического союза, 2 Международное правосудие 30 (2016) [Zhenis M. Kembaev, *Comparative Analysis of the Functioning of the Court of the Eurasian Economic Union*, 2 International Justice 30 (2016)].

[25] Карлюк М.В. Система обеспечения права Евразийского экономического союза, 10 Право в современном белорусском обществе 181 (2015) [Maxim V. Karlyuk, *The System for Ensuring the Law of the Eurasian Economic Union*, 10 Law in Modern Belorussian Society 181 (2015)].

a. the specific act affected the rights and legitimate interests of economic entities;

b. the issues raised could have a substantial influence on the decision on the merits.[26]

A supreme judicial authority could exercise this right, either on its own motion or upon a request by an economic entity.[27] Public authorities were deprived of their right to submit such requests, which therefore resulted in violating the principles of equality and competition in national proceedings.

One of the major differences between EU and EurAsEC law regarding preliminary ruling procedure is that lower courts in the EurAsEC did not have the power to make these references. This seems even more striking if we take into account the fact only 45% of the total number of references for preliminary rulings submitted to the CJEU were made by supreme courts.[28]

The right of a supreme court from a Member State of the EurAsEC to make a reference for a preliminary ruling did not convert into an obligation unless the court's judgment in specific proceedings could not be subject to appeal.[29]

This fact, combined with the unwillingness of national courts to be bound by an interpretation given by the EurAsEC Court, has resulted in a systematic refusal of Russian courts to make preliminary rulings – something which is evidenced by relevant court rulings.

Supreme courts of the Russian Federation have denied 12 motions to make reference to the EurAsEC Court. Ten of these were declined because they were submitted by a party that did not have such a right – the customs[30]; in one case the court ruled that the issue addressed by a party to the case did not fall within the law of the Customs Union[31]. Finally, in a further case, the Supreme Court of the Russian Federation refused to make a reference, pointing out that reference to the EurAsEC

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[26] Art. 3, para. 1 of the Agreement on appeals to EurAsEC court by economic entities with disputes arising within Customs Union (December 9, 2010) [Договор об обращении в Суд ЕврАзЭС хозяйствующих субъектов по спорам в рамках Таможенного союза (9 декабря 2010 г.)].

[27] *Id.* Art. 3, paras. 1, 2.

[28] 4100 from 9146. *See* Court of Justice of the European Union Annual Report 2015: Judicial Activity: Synopsis of the Judicial Activity of the Court of Justice, the General Court and the Civil Service Tribunal, at 97–99 (May 1, 2017), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf.

[29] Art. 3, para. 1 of the Agreement on appeals to EurAsEC court by economic entities with disputes arising within Customs Union (December 9, 2010).

[30] Определения Высшего Арбитражного Суда РФ от 14 февраля 2014 г. № ВАС-713/14, ВАС-638/14, ВАС-311/14, ВАС-485/14, ВАС-494/14, ВАС-534/14, ВАС-335/14, ВАС-499/14, ВАС-531/14, от 24 февраля 2014 г. № ВАС-1659/14 [Decisions of the Supreme Arbitration Court of the Russian Federation No. VAS-713/14, VAS-638/14, VAS-311/14, VAS-485/14, VAS-494/14, VAS-534/14, VAS-335/14, VAS-499/14, VAS-531/14 of February 14, 2014, No VAS-1659/14 of February 24, 2014].

[31] Определение Высшего Арбитражного Суда РФ от 8 сентября 2013 года № ВАС-8698/13 [Decision of the Supreme Arbitration Court of the Russian Federation No. VAS-8698/13 of September 8, 2013].

Court is a right, and not an obligation for the Supreme Court, and such a refusal thus could not constitute a flagrant procedural fault.[32]

All in all, during the three years of its existence the EurAsEC Court has only received one reference for a preliminary ruling – made by the Supreme Economic Court of the Republic of Belarus.[33] Thus, preliminary rulings have been extremely rare in the EurAsEC Court and did not become an effective instrument for influencing the case-law of national courts.

The powers of the EAEU Court to give opinions on references for preliminary rulings cannot be considered to be lost irrevocably. Para. 49 of the Statute of the Court allows each Member State to draft a list of competent authorities and organizations who will have the right to submit applications to the Court on its behalf. We believe that a list of national authorities which hold the right to submit requests for clarification could potentially include national courts.

The desire of national courts to acquire such a tool will greatly depend on the Court itself – on how well argued its advisory opinions are. The Court should strive to assert that its opinion is correct, and to provide a general guidance that could be followed by national courts in domestic proceedings.

At the same time, it is necessary to acknowledge that the procedure of giving advisory opinion is not truly equivalent to the preliminary ruling procedure as established in EU law.[34] An act adopted pursuant to a reference for a preliminary ruling is binding, while an advisory opinion on an application for interpretation as stipulated in para. 98 of the Statute is merely recommendatory. Another difference is the discretion of national courts as to whether to submit a request for clarification while a reference for a preliminary ruling is compulsory for the national courts whose decision on the specific case is not be subject to appeal.

For now, all Member States, except for the Republic of Kazakhstan, have indicated only their Ministries of Justice as bodies authorized to exercise the right of judicial recourse to the EAEU Court. The Republic of Kazakhstan delegated these powers to the General Prosecutor Office, Ministry of Foreign Affairs, Investments and Development, National Economy, and Justice. The first application for interpretation from a Member State (clarification of the issue of application of preferential rates provided for the importation of goods in respect of which tariff quotas are established) was submitted to the Court by the Ministry of National Economy of the Republic of Kazakhstan.[35] It should be noted that the application was submitted on

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[32] Определение Верховного Суда РФ от 29 мая 2015 г. № 87-ПЭК15 [Decision of the Supreme Court of the Russian Federation No. 87-PEK15 of May 29, 2015].

[33] Case No. 1-6/1-2013 *Reference for a preliminary ruling submitted by the Supreme Economic Court of the Republic of Belarus* (May 1, 2017), available at http://courteurasian.org/page-20991.

[34] Art. 267 of the TFEU.

[35] Case No. CE-2-1/2-16-BK *Advisory opinion upon the request of the Ministry of National Economy of the Republic of Kazakhstan* (May 1, 2017), available at http://courteurasian.org/doc-16833.

the initiative of immediate stakeholders – the association of legal entities "Eurasian Union of Participants of Foreign Trade Activities." Subsequently, the representatives of this association managed to communicate their position directly to the Court by filing written pleadings *amicus curiae* supported by an intervention during the hearing. An economic entity can also use an alternative route by requesting the Commission to submit an application for interpretation to the Court.[36] In this regard, it should be noted that the Commission is entitled, rather than obliged, to submit an application for interpretation to the Court. Therefore, a refusal by the Commission to fulfill such a request could not be challenged before the Court.

2. Other Possibilities of the EAEU Court to Influence National Judicial Practices

The fact that the EAEU Court does not have the jurisdiction to give preliminary rulings does not exclude its possibility to influence the case-law of national courts. This may happen in two situations:

a. an act of a public authority is challenged before a national court, if this act was based on a Commission decision recognized by the EAEU Court as being "not in line" with the Treaty, or an international treaty within the Union;

b. when a national court refers to the legal positions contained in the statement of reasons of an EAEU Court's judgment.

With regard to the first case, it is evident that the existence of a Court judgment recognizing a Commission decision as "not in line" with the Union law is likely to determine the outcome of domestic proceedings.[37] Positive examples include court rulings recognizing decisions to impose administrative penalties on Yuzhny Kuzbass OJSC as illegal or unenforceable.[38] The liability arose with the company in connection with its failure to meet the requirements of the decision of the Commission of the Customs Union No. 335 of August 17, 2010, which the EurAsEC Court recognized as being in breach of international treaties upon an application submitted by the company itself.[39] As could be concluded from the analysis of proceedings initiated by

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[36] *Ковалев А.В.* Толкование права Евразийского экономического союза: правовые основы подготовки разъяснений и эволюция интерпретационного процесса, 1 Актуальные проблемы российского права 194 (2016) [Alexander V. Kovalev, *Interpretation of the Eurasian Economic Union Law: Legal Basis for the Preparation of Clarifications and the Evolution of the Interpretation Process*, 1 Actual Problems of Russian Law 194 (2016)].

[37] If the Court recognizes Commission's decision as not in line with Union law purely on procedural ground this will have no effect on a national implementation measure.

[38] Постановления Федерального арбитражного суда Западно-Сибирского округа от 18 апреля 2013 г. по делу № А27-13542/2012, от 24 апреля 2013 г. по делу № А27-13543/2012 [Resolutions of the Federal Court of Arbitration of the Western-Siberian District No. A27-13542/2012 of April 18, 2013, No. A27-13543/2012 of April 24, 2013].

[39] *Yuzhny Kuzbass OJSC v. Commission*, *supra* note 5.

Yuzhny Kuzbass OJSC in domestic courts, "under such circumstances, national courts are bound by the interpretation offered by supranational judicial authorities."[40]

Things seem to be more complicated if, by the time of the hearing at a national court, the EAEU Court has not yet delivered its judgment on the compatibility of the Commission's decision with Union law. In such situations, the applicant would be well advised to request the national court to suspend the proceedings until the EAEU Court delivers its judgment. As simple and evident as this mechanism might seem, its practical implementation proves to be far less evident. The Civil Procedure Code of the Russian Federation does not contain any provisions allowing a court to suspend the proceedings until the EAEU Court delivers a judgment.[41] For arbitration proceedings, however, this is technically possible. Pursuant to Art. 144(5) of the Arbitration Procedure Code of the Russian Federation, an arbitration court shall have the right to suspend the proceedings on a case if an international court or a court of a foreign state is examining another case, whose outcome may be of importance for the consideration of the given case. It should be noted that proceedings are suspended at the court's exclusive discretion: though, according to Art. 143, part 1, clause 1 of the Arbitration Procedure Code, it is compulsory for a court to suspend proceedings on a case if it is impossible to consider the given case until the resolution of another case, examined by the Constitutional Court of the Russian Federation; by a constitutional (statutory) court of a subject of the Russian Federation; by a court of general jurisdiction; or by an arbitration court.

The discretion enjoyed by the courts leads to highly improbable outcomes: an arbitration court may rule against suspending the proceedings even though the same applicant brought a case to the EurAsEC Court[42] and decide to suspend them in a situation where proceedings before the EurAsEC Court were initiated by another person.[43]

Another major concern is that Russian procedural law does not allow revision of an enforceable court ruling in the light of new facts pursuant to a judgment of the EAEU court; while permitting it with respect to the acts of the European Court of

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[40] Павлова Н.В. Наднациональное регулирование таможенных правоотношений и национальное правосудие, 1 Судья 16 (2016) [Nataliya V. Pavlova, *Supranational Regulation of Customs Matters and National Justice*, 1 Judge 16 (2016)].

[41] Arts. 215, 216 of the Civil Procedure Code of the Russian Federation contain exhaustive lists of situations where a court is, respectively, obliged or entitled to suspend the proceedings. They do not contain any mention of consideration of a case by the EAEU Court or an international court.

[42] Постановление Федерального арбитражного суда Московского округа от 7 августа 2013 г. по делу № А40-104443/2012 [Resolution of the Federal Court of Arbitration of the Moscow District No. A40-104443/2012 of August 7, 2013]

[43] Определение Седьмого арбитражного апелляционного суда от 24 января 2014 г. по делу № А27-5548/2013 [Decision of the Seventh Arbitration Court of Appeal No. A27-5548/2013 of January 24, 2014].

Human Rights, the Constitutional Court and the Supreme Court.[44] This is confirmed by the case-law of the Russian arbitration courts which declined the application to revise an enforceable court ruling on the grounds that the EurAsEC Court took an opposite view on the matter.[45]

This clearly shows that procedural law of the Russian Federation has not been adopted yet to the realities of the Eurasian integration, and this undermines the importance of the Court's case-law in domestic proceedings. It is evident that lodging an appeal to the EAEU Court against a decision, or an action (inaction) of the Commission is not always the ultimate goal for the economic entity. A judgement of the EAEU Court, when in favor of an economic entity, should be applied to restore the violated rights in the national legal system, most usually – in legal proceedings. The uncertainty surrounding the suspension of proceedings by a national court pending judgment of the EAEU Court and the impossibility to revise a court's ruling following the EAEU Court's judgement deprives the economic entity of the possibility to restore its violated rights, even pursuant to a favorable judgment of the EAEU Court.

Another issue is that Russian courts should not only follow the operative part of the Court's judgment, establishing that a Commission decision is not in line with the EAEU law, but should also follow the Court's interpretation of EAEU law provisions, i.e. consider the Court's judgments as sources of precedent law.

In that regard the analysis of the Russian judicial practice, illustrated by the EurAsEC Court's judgments, reveals an interesting picture.

Legal positions contained in certain judgments have been assimilated to the widest possible extent, while some other court rulings have not affected judicial practice at all. We believe it depends on whether the judgment contained universal rules applicable to a broad range of similar cases, or whether the EurAsEC Court merely sought to solve a particular dispute, without establishing a rule of precedent law.

Among the rulings of the EurAsEC Court assimilated by the Russian judicial practice, one should mention the judgment of the Chamber in the case of *ONP LLC* of November 15, 2012, upheld by a decision of the Appeals Chamber of February 21, 2013[46] which defined both a universal and a special rule. The universal rule concerned

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[44] Art. 392, part 4, points 3–5 of the Civil Procedure Code, Art. 311, part 3, points 3–5 of the Arbitration Procedure Code, Art. 350, part 1, points 3–6 of the Administrative Procedure Code.

[45] Определение Арбитражного суда Челябинской области от 4 апреля 2013 г. по делу № А76-3828/2009 [Decision of the Chelyabinsk Region Arbitration Court No. A76-3828/2009 of April 4, 2013], постановления Восемнадцатого арбитражного апелляционного суда от 30 июля 2013 г., Федерального арбитражного суда Уральского округа от 9 сентября 2013 г. по делу № А76-3828/2009 [Resolutions of the Eighteenth Arbitration Court of Appeal No. A76-3828/2009 of July 30, 2013, of the Federal Court of Arbitration of the Ural District No. A76-3828/2009 of September 9, 2013], Определение Высшего Арбитражного Суда РФ от 27 февраля 2014 г. № ВАС-1249/14 [Decision of the Supreme Arbitration Court of the Russian Federation No. VAS-1249/14 of February 27, 2014].

[46] Case No. 1-7/2-2012 *ONP LLC v. Commission* (May 1, 2017), available at http://courteurasian.org/page-20801.

inadmissibility of restricting the right of an economic entity to define, at its sole discretion, the principal applicable rule of interpreting the Nomenclature of Goods. The special one concerned the classification of specific goods under a selected heading of the Nomenclature. Russian law enforcement practice assimilated both of these positions.[47]

A universal rule for interpreting the advisory nature of the Comments to the Nomenclature of Goods was defined in the case of *Nika LLC and Zabaikalresurs LLC*.[48] The EurAsEC Court made it clear that the advisory nature of the Comments does not mean that unreasoned derogations therefrom are admissible. The said legal determination was assimilated in rulings of several appeal courts.[49]

Finally, one of the position of the EurAsEC Court in the *SeverAvtoProkat LLC* case[50] regarding a possible retroactive application of a provision of a Commission's decision caused such a major switch in the case-law of the Russian courts that the Constitutional Court had to intervene.[51] It pointed out that the legal positions of the EurAsEC Court may not constitute grounds for derogating human and civil rights and freedoms as established in international treaties and the Constitution.

All of the above testifies to the significance of determinations by the Court of the Union (earlier the EurAsEC Court), in national law enforcement practices. A supranational court cannot function in an ivory tower; its concerns embrace not only matters of the law of the integration association, but also how these

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47 Постановления Пятнадцатого арбитражного апелляционного суда от 24 апреля 2014 г. по делу № А32-30717/2013, Двадцатого арбитражного апелляционного суда от 6 июня 2014 г. по делу № А06-7112/2013, от 29 июля 2014 г. по делу № А09-818/2014, Девятого арбитражного апелляционного суда от 22 октября 2015 г. по делу № А40-78259/2015 [Resolutions of the Fifteenth Arbitration Court of Appeal No. A32-30717/2013 of April 24, 2014, of the Twentieth Arbitration Court of Appeal No. A06-7112/2013 of June 6, 2014, No. A09-818/2014 of July 29, 2014, of the Ninth Arbitration Court of Appeal No. A40-78259/2015 of October 22, 2015].

48 Case No. 2-4/7-2014 *Nika LLC and Zabaikalresurs LLC v. Commission*, judgment of the Chamber of May 20, 2014 upheld by the decision of the Appeals Chamber of October 14, 2014 (May 1, 2017), available at http://courteurasian.org/page-21661.

49 Постановления Четвертого арбитражного апелляционного суда от 26 сентября 2014 г. по делу № А78-5492/2013, Пятого арбитражного апелляционного суда от 14 апреля 2016 г. по делу № А51-23838/2015, от 6 апреля 2016 г. по делу № А51-22124/2015, от 26 мая 2016 г. по делу № А51-26736/2015, от 25 августа 2016 г. по делу № А51-26735/2015, Восьмого арбитражного апелляционного суда от 11 февраля 2015 г. по делу № А46-11894/2014, от 30 мая 2016 г. по делу № А46-11452/2014 [Resolutions of the Fourth Arbitration Court of Appeal No. A78-5492/2013 of September 26, 2014, of the Fifth Arbitration Court of Appeal No. A51-23838/2015 of April 14, 2016, No. A51-22124/2015 of April 6, 2016, No. A51-26736/2015 of May 26, 2016, No. A51-26735/2015 of August 25, 2016, of the Eighth Arbitration Court of Appeal No. A46-11894/2014 of February 11, 2015, No. A46-11452/2014 of May 30, 2016].

50 Case No. 2-4/1-2014 (1-7/5-2013) *SeverAvtoProkat LLC v. Commission* (May 1, 2017), available at http://courteurasian.org/page-21151.

51 Определение Конституционного Суда РФ от 3 марта 2015 г. № 417-О [Decision of the Constitutional Court of the Russian Federation No. 417-O of March 3, 2015].

determinations can be propagated at national level. This is the only way to achieve the supremacy and efficiency of Union law. Taken that a supranational court aspires not only to settle specific disputes, but also to fill gaps in the legislation of the integration organization, the EAEU Court needs to strive for establishing universal rules in each of its rulings.

3. Limited Number of Applications: An Issue of Trust?

According to the statistics in 2015 the Court received six applications from economic entities. The application in *Kapri* case[52] was rejected due to the plaintiff's lack of *locus standi*; the one in *Gamma* case[53] – as manifestly unfounded. A third application (*Unitrade* case[54]) was found admissible by the Court but was later revoked by the plaintiff. Finally, three applications (*Tarasik*,[55] *Sevlad*[56] and *General Freight*[57] cases) led to judgments adopted by the Court's Chamber.

Contrary to what could have been expected the year 2016 did not bring any notable increase in the number of applications from economic entities. In fact three of the seven applications concerned appeals against the judgments of the Court and led to judgments of the Appeal Chamber.

Three applications were rejected by the Court – in the *Remdizel* case[58] the application was rejected as manifestly unfounded as the applicant tried to challenge a Commission's recommendation. Remdizel's appeal against the Court's order was rejected by the Appeal Chamber of the Court as the Rules of Procedure expressly provide that only judgments of the Court may be challenged.[59] In the *Rusta-Broker* case[60] the application was rejected by the Court as manifestly unfounded.

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52 Case No. CE-3/2-15-KC *KAPRI CJSC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-14373.

53 Case No. CE-3/1-15-KC *Gamma LLP v. Commission* (May 1, 2017), available at http://courteurasian.org/page-24101.

54 Case No. CE-1-2/1-15-KC *Unitrade JSC v. Commission* (May 1, 2017), available at http://courteurasian.org/page-24121.

55 *Tarasik K.P. v. Commission*, *supra* note 19.

56 *Sevlad LLC v. Commission*, *supra* note 16.

57 *General Freight CJSC v. Commission*, *supra* note 2.

58 Chamber order in case No. CE-1-2/3-16-KC/1 *Remdizel LLC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-15763.

59 Appeals Chamber order in case No. CE-1-2/3-16-KC/1 *Remdizel LLC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-15763.

60 Case No. CE-3/2-16-KC *Rusta-Broker LLC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-17113.

Finally, in the *ArcelorMittal Krivoj Rog* case[61] an application challenging anti-dumping measures imposed by the Commission was accepted and is currently under consideration.

Thus, if we only count new applicants their number has dropped from six in 2015 to just three in 2016. The small number of applications may be partially explained by the limited competence of the Court (particularly, the impossibility to award compensation for damages) or the lack of activity of the Commission in certain fields.[62] We believe, however, that the main reason lies in a certain caution, not to say lack of trust, of the legal and business community in this new institution. It is thus vital for the Court to establish itself a reputation based on professionalism, efficiency and accessibility.

3.1. Professionalism

Professionalism is highlighted in the quality of judicial acts. Thus, it is important that the judgments of the Court of the Union be not only well-grounded, but, moreover, clear and easily understood. In this situation, the task of the Court is to make its legal positions well-argued and sufficiently precise as to preclude differing interpretations by the Member States or their bodies, and particularly their courts. The ideal legal position of a supranational court is one that could be incorporated by a national court in its judicial acts without any adjustments or additions. This is especially important for advisory opinions since these are not legally binding.

The EAEU Court, intent upon its mission of conveying the key elements of its judicial acts to the states and their authorities, has made a practice of preparing summaries of these acts[63] – which contain not only a description, but also the legal positions, i.e., the conclusions that, according to the Court, are universal and establish precedent.

3.2. Efficiency

We believe that the efficiency of a supranational court should not be estimated solely by the number of cases examined, or by the rate of judgments rendered in favour of economic entities.

Conclusions on the Court's efficiency must be drawn from the legal positions which are contained in the findings of the Court, and according to its intentions in the provision of protection for the rights and freedoms of entrepreneurs. Even when a ruling is made not in favor of the applicant (the Commission decision is considered to be in line with the Treaty), the EAEU Court has the option to insert legal positions into its findings that could contribute to the protection of rights and

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61 Case No. CE-1-2/4-16-KC/1 *ArcelorMittal Krivoy Rog JSC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-16813.

62 For instance, in the field of competition law no decisions have been adopted yet.

63 Available at http://courteurasian.org/page-24221, http://courteurasian.org/page-24451.

legal interests of plaintiffs or other persons in national courts. This could be done, i.a., by indicating that the situation of the plaintiff does not fall within the application of a contested decision. This is particularly important, given that appeal against the Commission decision does not always constitute the end goal, but is often merely a step towards the restoration of the applicant's rights in domestic legal proceedings. In such situations, the conclusions made by the Court in its findings could prove to be more significant than the wording of the operative part of the judgment, since they will form the basis of the plaintiff's arguments in a national court.

This approach confers special responsibility on the Court. Judicial rulings must be drafted with the understanding that any of the Court's findings could affect the legal position of legal entities in domestic proceedings.

In discussing the notion of efficiency, it could be also worthwhile to assess the efficiency of different legal remedies available to the applicants. It is revealing that in the absence of a large number of legal remedies, the EAEU Court strives to render those which are available as effectively as possible. This can be exemplified by the broad definition of inaction in the *Tarasik* case[64]; and by the Court's willingness to automatically verify, in such cases where the validity of a Commission's decision is challenged, whether the Commission possessed the necessary competence to adopt contested decisions – and whether in doing so it followed essential procedural requirements.[65]

Finally, a special aspect of efficiency for a judicial body is the time taken for its judicial proceeding. Para. 96 of the Statute establishes a mandatory period of 90 days from the date of receipt of application (except in case of disputes of which the subject-matter is the granting of industrial subsidies, agricultural state support measures, the application of safeguard, anti-dumping and countervailing measures – where this term shall not exceed 135 calendar days[66]). By comparison, the average duration of proceedings in the CJEU is 16.1 months.[67]

The total 90-day period for the consideration of cases guarantees economic entities prompt consideration of their applications – which should also contribute to the protection of the rights and legal interests of entrepreneurs in proceedings before domestic courts.

3.3. Accessibility

This element consists of several aspects:

a. First of all, it includes the *locus standi* of economic entities before the EAEU Court. The EAEU Court Statute allows economic entities, whose rights and legitimate interests in the area of business and other economic activities is directly affected by

64 *Tarasik K.P. v. Commission*, *supra* note 19.

65 *Sevlad LLC v. Commission*, *supra* note 16.

66 Art. 37(2) of the Rules of Procedure.

67 *See* Annual Report 2015, *supra* note 28.

Commission decisions, action or inaction, to challenge them in the event that this entailed a violation of any rights and legitimate interests of the entity granted by the Treaty, or an international treaty within the Union.[68]

This provision contains two conditions: (1) direct concern; (2) violation of the rights or legal interests provided by the Treaty or an international treaty within the Union.

It is important to note, as established by the Court in the *Sevlad* case, that the violation of the rights and legal interests of the plaintiff may only be assessed during a consideration of the merits. As the Court noted, "the verification of a violation of the rights and legitimate interests of the plaintiff in the area of business or other economic activities, granted by the Treaty and (or) international treaties within the Union, should be preceded by an assessment of the legality of the challenged decision of the Commission."[69] Thus, the Court must determine the legality of the Commission's decision first, since "the violation of the rights and legitimate interests of the applicant in the area of business and other economic activities can be caused only by the execution (application) of a decision of the Commission, which is not in line with the Union law."[70]

Therefore, the *locus standi* of an economic entity includes only the first requirement – that his rights and legal interests are affected.

As determined by the Court in the decision of the Chamber in the *Sevlad* case, "In accordance with the principle of legal certainty, the decision of the Commission or its particular provisions may be recognized as directly affecting the rights and legitimate interests of an economic entity in the area of business and other economic activities *inter alia* in cases where the corresponding decision is applied to the specific economic entity in connection with its business activities."[71]

Doing so, the Court has clearly called for the widest possible interpretation of this criterion, thus making legal protection more accessible. Economic entities do not need to prove that the Commission's decision has been applied to them – it is sufficient to show that it could be.

This situation should be distinguished from the one that occurred in the *Capri*[72] case, where the applicant sought to challenge a Commission that imposed less stringent requirements on its competitors operating in an adjacent field. In this case the applicant could not claim direct concern, since the goods he was importing did not fall within the application of the Commission's decision. The EAEU Court, when dismissing the application, pointed out that "the applicant has failed to substantiate

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68 Para. 39(2) of the Statute of the Court.

69 Para. 7.2.1, subpara. 1 of the judgment of the Chamber of the Court in the case *Sevlad LLC v. Commission*, *supra* note 16.

70 *Id.* Para. 7.2.1, subpara. 3.

71 *Id.* Para. 6.2, subpara. 1.

72 Order of the Court of April 1, 2016 in the case *KAPRI CJSC v. Commission.*

how the contested Commission's decision directly affects the applicant's rights and legitimate interests in the area of business and other economic activities."[73]

b. A further important element in defining the accessibility of judicial protection in the EAEU Court is the absence of a preclusive time-limit for initiating actions against decisions, actions or inaction of the Commission. By comparison Art. 263 of the TFEU establishes a compulsory two month period for bringing an action for annulment. This strict time-limit could be justified by the need to ensure legal certainty. In practice, however, because of the very strict *locus standi* of non-privileged applicants under Art. 263, TFEU actions for annulment are practically never directed against legislative acts, and are instead challenged via the preliminary reference procedure[74] for which no time-limits are prescribed.[75]

Given the fact that in the EAEU, economic entities may only challenge Commission decisions directly, setting a preclusive deadline (even an extensive one) would constitute an unreasonable limitation of the right for judicial protection.

c. A prerequisite for the acceptance of an application is the payment of a fee.[76] Given the fact that in cases in which the Court shall grant the claims of the economic entity stated in the application, the fee shall be refunded,[77] this requirement does not appear to limit the access to the Court in any substantial way – provided that the amount of the fee does not become excessive for economic entities, including individual entrepreneurs.[78]

d. The other important element to take into consideration is that the Court may not order the unsuccessful party to pay the costs even if they have been applied for in the successful party's pleadings. On the one hand, the provision that each party bears its own costs[79] reduces the economic risks for the plaintiffs, as they may determine in advance the amount of their own expenses.

On the other hand, in cases where protection measures for the protection of the internal market are challenged, the rule on inability to assign the expenses to the losing party should be assessed critically – since the plaintiffs similarly bear the expenses linked to the functioning of specialized groups[80] formed in accordance with

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73 Order of the Court of April 1, 2016 in the case *KAPRI CJSC v. Commission*, para. 6.

74 Art. 267 of the TFEU.

75 *See, for instance*, case C-370/12 *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756, at 39.

76 Paras. 62 and 63 of the Statute; Art. 9, para. 3(d) of the Rules of Procedure.

77 Para. 64 of the Statute.

78 According to the decision of the Supreme Eurasian Economic Council No. 40 of December 21, 2015 since January 1, 2016 the amount of the duty is 39 368 Russian rubles.

79 Para. 66 of the Statute.

80 Para. 6 of the decision of the Supreme Eurasian Economic Council No. 102 of December 23, 2014.

Chapter VI of the Statute. Thus, in the case of *ArcelorMittal* the plaintiff was ordered to pay 2 250 000 Russian rubles to this end.[81] We believe that the impossibility for the plaintiff to obtain reimbursement of these costs constitutes a restriction of access to justice. In fact, economic entities are placed in a worse position in proceedings before the Court than in domestic proceedings, where there is a presumption that the unsuccessful party shall bear the costs in the form of the payment of experts' fees.[82] We believe that when measures for the protection of the internal market are found to be contrary to the EAEU law, the Court should be able to recover the expenses from the losing party.

e. Finally, the fifth element that characterizes the Court's accessibility is the requirement of prior recourse for the applicant to a pre-trial procedure.[83] For the Court it is extremely important, at the stage of determining the admissibility of an application, to establish the very fact that an application on the matter has been submitted to the Commission in accordance with the existing procedure. At the same time, we believe that the economic entity should not be obliged, when applying to the Commission, to indicate its intention to appeal to the Court in case of refusal. A similar position can be found in the CJEU case-law regarding actions for failure to act where a pretrial procedure is compulsory.[84] A further important point is the option for an economic entity, when applying to the Court, to supplement its position and to present new arguments in support of it. This is explained by the fact that the purpose of the pre-trial procedure is to convince the Commission to undertake a certain action, i.e. to modify or annul its decision, or to undertake a monitoring, or similar. In this context, the entity may choose to present not only legal but also economic or political arguments. At the stage of application to the Commission there are no disputing parties as yet, hence, the very structure of the argumentation may be different.

The argument that the Commission must be aware of the content of the claim prior to its submission is untenable, since one of the requirements for the acceptance of an application to the Court is the confirmation that copies of the application and of the attached documents have been sent to the defendant.[85] If the arguments submitted by the applicant seem convincing to the Commission, nothing prevents it

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81 Order of the Chamber of the Court in the case *ArcelorMittal Krivoy Rog JSC v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-17143.

82 *See* Arts. 106, 110 of the Arbitration Procedure Code of the Russian Federation, Art. 88, para. 1, Art. 94, para. 1, Art. 98 of the Civil Procedure Code of the Russian Federation, Arts. 125, 126, 133 of the Commercial Procedure Code of the Republic of Belarus, Arts. 114, 116, 135 of the Civil Procedure Code of the Republic of Belarus, Arts. 100, 107, 110 of the Civil Procedure Code of the Republic of Kazakhstan.

83 Para. 43 of the Statute.

84 *See* case T-12/12 *Laboratoires CTRS v. Commission*, ECLI:EU:T:2012:343, at 40.

85 Art. 9, para. 3(e) of the Rules of Procedure.

from settling the dispute through an agreement before the delivery of a judgment.[86] As Judge T.N. Neshataeva put it in her dissenting opinion in the *Volkswagen* case as considered by the EurAsEC Court, "the alteration and improvement of the reasoning in preparation for the consideration of a case forms an integral part of the legal practice. […] a dismissal of an application by the Court on the sole grounds that the same arguments must have been presented before the Commission and before the Court leads to the substitution of the notions of 'legal proceedings' and 'pre-trial procedure.'"[87]

Conclusion

As has been demonstrated in the first years of its existence the Court has come across three major challenges, all interrelated. They can only be overcome by the Court by building a reputation for itself.

This should firstly take place among Member States and bodies of the Union, which would help the Court to ensure compliance with its judgments and allow to envisage an enlargement of its competence.

Secondly it must occur among national courts – which is essential for the dissemination of the Court's case-law. National courts themselves could have an interest in their inclusion in the list of national authorities which hold the right to submit requests for clarification (although they will likely remain opposed to the reappearance of a preliminary reference procedure). Thus, it is for the EAEU Court to prove to national courts how useful these instruments might be. This could be done by a form of dialogue between institutions, via participation in conferences, or through organizing meetings. However, the first step could be taken by starting to include references to the case-law of national courts.

Finally, the reputation must be reinforced among the business and legal community – since one of the most important functions of the Court is to protect the rights and legitimate interests of economic entities. Both are likely to judge the Court on its professionalism, accessibility and efficiency.

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[86] Art. 54 of the Rules of Procedure.

[87] Separate opinion of Judge T.N. Neshataeva in the case No. 2-4/10-2014 *Volkswagen AG v. Commission* (May 1, 2017), available at http://courteurasian.org/doc-12073.

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THE SCOPE OF THE ARBITRAL AWARD BINDING EFFECT (INTERESTS OF «THIRD PARTIES» IN INTERNATIONAL ARBITRATION)

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Modern business international transactions are multiparty and complicated. Such contracts are usually composed of several contracts which can contain bilateral dispute resolution arrangements. According to the principle of parties autonomy dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will be resolved by arbitration exclusively between these two parties. Other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest, they might have the outcome of the dispute; these parties will remain alien both to the arbitration proceedings and an arbitral award. Their interests are not taken into consideration and left unprotected. Arbitration proceedings, unlike litigation, usually do not bear any intervention or joinder of parties, which is explained by the contractual nature of arbitration.

Thus, the binding power of an arbitral award extends only over parties of an arbitration agreement. Meanwhile, an arbitral award can affect interests of third parties. How can these parties defend their interests in arbitration proceedings and during recognition and enforcement proceedings in national courts? There are two ways of resolving such problem in state court litigation. The first one is the compulsory participation of any third party with any legitimate interest in litigation through intervention, joinder of parties, and consolidation of cases. A court ex officio has to gather all parties that can have any legitimate interest in resolving the dispute. If judgment affects any interest of a party that was not involved in the proceedings judgment should be reversed in appellate court. The second way is also the solution against parallel proceedings. This way is to harmonize the outcome of parallel proceedings by the principle of lis pendens and res judicata.

The paper examines the binding and res judicata effects of the arbitral award towards third parties through the Russian and international experience of defending of interests of third parties in international arbitration and litigation.

Keywords: civil procedure; international commercial arbitration; intervention; arbitral awards; res judicata; third parties.

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Introduction

The problem of the participating of the third parties in arbitration is not new to the legal science.[1] It is obvious that as a general rule an arbitral award has binding effect only for the parties to the arbitral agreement. This rule originates from the main principle of arbitration – the principle of the party autonomy. But modern business transactions especially in an international context are extremely complicated and meant the participation of several parties. Also, the complicated structure of many multinational groups and companies requires several affiliates, subsidiary companies, directors or even stockholders of the same group to become actively involved in the execution of the contract.[2]

Usually, such multiparty projects are executed through several agreements some of which could have an arbitration clause. It leads to the situation where jurisdiction for the multiparty projects disputes is fragmented. Each dispute has its forum (state court or arbitration tribunal). In arbitration, notwithstanding any legitimate interest, a party that is not part of the arbitral agreement could not participate in the resolution of the

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1 *See* Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford: Oxford University Press, 2011).

2 *Id.* at 14.

dispute in arbitration proceedings. As an example, the following current case can be considered. Two contracts were concluded: the supply contract with the arbitration clause and the insurance contract with no jurisdictional clause. The insurance contract establishes that the insurance company has to pay insurance money for defective goods in case if the supplier would not pay the damages to the buyer. The buyer brings an action to arbitration tribunal against the supplier and loses his case. So the buyer gets the arbitral award that proves that the supplier has not paid the damages to the buyer. The buyer brings an action against the insurance company and request insurance money. The question is what effect this arbitral award has for the insurance company in subsequent adjudication in the state court. There is not only a question of the effect the arbitral award but also a wider question of the distinguishing of the question of law (so called legal qualification), question of issues (facts) and applying final awards and judicial decisions in the subsequent proceedings.

It is worth to begin with analyses of the legislation and case law concerning the litigation in the state courts. How to protect a third party from the binding effect of the judicial decision? There are only two ways. The first one is a compulsory participation of any third party with any legitimate interest in the litigation through intervention, joinder of the party, consolidation of cases. It is compulsory for the court which *ex officio* has to gather all parties that can have any legitimate interest in resolving a dispute. If a judgment affects any interest of a party that is not involved, this judgment is considered as unlawful and should be reversed. The second way is also the solution against parallel proceedings. This way is to harmonize the outcome of parallel proceedings. So here the principle of *lis pendens* and *res judicata* are working to prevent conflicting decisions.

The first way is preferable and national civil proceedings give precedence to it. First of all, because it more ensures rights of such nonparticipating third parties.

The question is can these methods be applied to arbitration. The first method does not work in arbitration. It is possible in some arbitration institution to bring to trial a third party, but national legislation limits this possibility. The consent of both parties, of one party and the third party, both parties and the third party are required. The general rule is that only the party of the agreement can be in arbitration. Exclusions from this rule are quite rare. The participation of a third party is not usual. An arbitration tribunal could not *ex officio* bring any party to the action. And it is proved to be effective. The third party can participate if it wants to defend his rights and suffer or enjoy the effect of the arbitral award.

The second way is to extend *res judicata* effect of the arbitral award to the third party. This, first of all, violates the fundamental right to be heard. Secondly, it does not resolve the problem because the understanding of the *res judicata* effect of an arbitral award is not clear even for the participated parties. *Res judicata* is not only about binding effect. It also prohibits reassertion; it has enforcement effect and evidentiary presumption effect. And it is not obvious that even after recognition of

the arbitral award it would have the same *res judicata* effect as a judicial decision for the interested parties and the state courts and arbitral forum.

In mentioned example can party of the agreement (the buyer) in the state court refer to arbitral award as it contains some collateral estoppel ("goods were defective"). From Russian practice, the answer is no. It works only for the facts set up by state courts. In Russian precedent law including the Constitutional Court of the Russian Federation practice, it is admitted the right of such third party with significant interest to ask a state court to annul or void an arbitral award. The reason is that his right to be heard and public policy were violated. The third party is meant to go to the court to ask to set the award aside. In some countries, state court applies *lis pendens* principle when two parties are in arbitration proceedings, and one party and the third party are in litigation in a state court. In this case, court suspends proceedings, but it happens quite rare.

One more solution is to admit that an arbitration tribunal has no competence or jurisdiction to resolve a dispute that affects the right of the third party. This idea can be found in the court practice of Latvia.

One more mechanism to protect rights of the third party is not to extend *res judicata* effect. So third party during adjudication in state court could challenge the rights, relation or facts stated by an arbitral award. Here no process of setting arbitral award aside is needed.

There is no unified decision now how to protect a third party interest in an arbitral award. The same can be said about the possibility of the third party to take advantages of the arbitral award that protects its right. But arbitration awards are worldwide recognized and enforced, so it is worth to have some unified way to resolve this problem.

We should find the balance between private and public nature of an arbitral award, provide party autonomy that limits the effect of arbitral award but at the same time we should give more credits to the arbitration and approximate it to the state adjudication.

1. *Res Judicata* and Legal Power of Judicial Decisions of State Courts: Brief Overview

The doctrine of *res judicata* is well established in the common law jurisdictions of England, Ireland, Canada, India, Australia and New Zealand.[3] In civil law countries, we usually distinguish legal power (effect) of a final judicial decision (*force de chose jugée*, *materielle Rechtskraft*). Even superficial analysis of the *res judicata* and the legal effect doctrines shows that core of these theories is similar. But there are a lot of differences

[3] Interim Report on *Res Judicata* and Arbitration, Berlin Conference (2004) (Mar. 3, 2017), available at www.ila-hq.org.

and peculiarities which have been developed in these different jurisdictions what make it impossible to reach unified approach to the idea of legal effects of judicial decisions and arbitral awards. Such unified approach was unnecessary while these doctrines concern state court judgments. But when we try to use these concepts to the international arbitration awards all these diversities prevent us from the clear answer to the question what *res judicata* or other legal effect does arbitral awards have.

In this section the both doctrines will be briefly analyzed to make some grounds to consider *res judicata* or other legal effects of an arbitral award.

1.1. Res Judicata in Common Law Countries

For a decision to qualify as a *res judicata*, it must be pronounced by a judicial tribunal of competent jurisdiction and must be final and conclusive and on the merits.[4] The effect of a *res judicata* decision is that it disposes finally and conclusively of the matters in controversy, such that – other than on appeal – that subject matter cannot be re-litigated between the same parties (or their privies).[5] The *res judicata* effect of an earlier decision is raised by a party in subsequent proceedings by pleading: the cause of action estoppel; or issue estoppel. If accepted, the plea will have the effect of precluding the other party from contradicting the earlier determination in the later proceedings. The rules of estoppel by *res judicata* are rules of evidence.[6]

Res judicata is a portmanteau term which is used to describe some different legal principles with different juridical origins. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel." It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example, to recover further damages. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is, in reality, a substantive rule about the legal effect of judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action.[7] A corresponding rule has applied in England by Civil Jurisdiction and Judgments Act 1982 to foreign judgments. Fourth, there is the principle that even where the

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[4] Peter R. Barnett, *Res Judicata, Estoppel and Foreign Judgments* 11 (Oxford: Oxford University Press, 2001).

[5] *Id.* at 8.

[6] *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1966] 2 All ER 536 at 564 (HL).

[7] *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.* [2013] UKSC 46 (July 3, 2013).

cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties. "Issue estoppel" was the expression devised to describe this principle. Fifth, there is the principle first formulated in *Henderson v. Henderson* (1843), which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

The cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.[8]

So there are some difficulties concerning its application even to state court judgment. When *res judicata* is usually discussed the conclusive and preclusive effects are implied. The binding characteristic of a judicial decision is not part of this conception.

The key principles governing the doctrine of *res judicata* (both issue estoppel and cause of action estoppel) are 1) the decision of the first proceedings must be final; 2) *res judicata* applies to the same parties and their privies.

Res judicata effects of judgment are limited by the doctrines of privity and mutuality. According to the doctrine of privity only the parties or privies to the proceedings which gave rise to the *res judicata* can benefit or be bound by it in subsequent proceedings. The parties must be identical in all proceedings or privies to the parties in the first proceedings. No third person can rely on the effects of a *res judicata* or be bound by it.[9]

Res judicata in common law countries relies upon broad judicial discretion. In contrast to civil law countries where quite strict triple identity test (same claim, same grounds of claim, same parties) is applied, *res judicata* rules tolerate more flexible approach (the concept of privies of the parties, the idea of *Henderson v. Henderson* case, etc.).

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[8] *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93.

[9] Barnett 2001, at 96.

The main reason why *res judicata* has effect only when the same party test is passed is the recognized by all jurisdiction right to be heard. Any person whose rights and obligations are directly or indirectly are affected by the proceedings and adjudication should have right to participate in adversarial proceedings and set forth its side of the case.

But the same party test in the modern civil procedure is not strict enough to be considered as the literal identity of all participants of the proceedings with even the same procedural status. On the contrary both in common law and civil law the range of the "parties" who suffer or enjoy the effect of the judicial decision is wider than just participating parties.

In common law civil procedure the category of "privies" is used to identify all persons, who have community or privity of interest with the participating party. A privy is a person who has right to participate in the proceedings and who has some interest in its outcome. Usually, such persons should be noticed about proceedings. But their nonparticipation does not exclude the effects of *res judicata* towards them. The following persons can be considered as privies of the parties in the case law of common law countries:

1) a director of the company and company;
2) individuals who own or control the company and the company;
3) one company being alter ego of another company;
4) a bank solicitor and a bank;
5) an insured and the insurer;
6) a wife and a husband;
7) a stockbroker and a client etc.[10]

Also, the doctrine of judgment *in rem* should be mentioned. The doctrines of issue estoppel and cause of action relate to judgment *in personam* or *inter partes*, that is, they relate to judgment between parties. A judgment *in rem* results from an action *in rem*. An action *in rem* is proceedings to determine the status or condition of the rem itself. A judgment *in rem* is conclusive against all persons, not only against the parties to the proceeding. As an example of judgment *in rem* the following judicial decisions can be named: the ownership of land, a lawful non-conforming use of property; an abatement of rent order under rent control legislation; an adoption; the validity of treaty and others.[11]

1.2. Legal Effect of a Judicial Decision in Russia and Other Civil Law Countries

The title of the article is "binding effect" of an arbitral award. Deliberately the words *res judicata* is avoided. *Res judicata* concept is not congruent in the different jurisdictions. There is one common *res judicata* rule which is the preclusive effect

[10] Donald J. Lange, *The Doctrine of Res Judicata in Canada* 73 (4th ed., Toronto: LexisNexis, 2015).

[11] *Id.* at 375.

of any final judgments. Any decided case between the same parties could not be adjudicated again. Such interpretation is inherent in common law jurisdiction. There is a significant difference between understanding of the finality of a judgment in common law and civil law countries. In common law countries, the judgment is final when it rendered and resolved the dispute. In civil law countries, the judgment is not final before it comes into force.

The legal effect of a judgment in Russia means that a decision of a state court after the expiration of the term for appellation comes into force and has the following effects (consequences):

1. The preclusive effect which prohibits the plaintiff from re-litigation of the same claim, with same grounds against the same defendant.[12] In contrast to *res judicata* in common law countries, there are some possibilities to evade this rule by changing the remedy or the cause of action. The preclusive effect in Russia does not cover the claim that should have been raised but were not.

2. Conclusive effect of the judgment that comes into force means that the court that decides the case cannot change his decision (except the appellation, addition decision, and correction of clerical and arithmetical errors).

3. Collateral estoppel effect (or prejudicial effect) that means that once a court decides an issue of fact necessary to its judgment, that decision precludes re-litigation of the same issue on a different cause of action between the same parties. Art. 61 of the CivPC and Art. 69 of the ComPC state that issues established by a judicial act of the court that entered into legal force are not proved again when the commercial court considers another case in which the same persons participate. Issues established by a judicial decision that has entered into legal force are binding to the court. These issues could not be proven again and could not be challenged when considering another case in which the same persons participate. At the same time in the Decision of the Plenum of the Supreme Court of the Russian Federation of December 19, 2003 No. 23 "On the Judicial Decision"[13] the Court stated that persons who did not participate in the case have the right to challenge facts, established by the first judicial act. In such cases, the court adjudicates by a full study of all the evidence, introduced in the second trial.

4. Binding effect of the judgment which has both subjective and objective limits. Subjective limits narrow the power of the judicial decision to the participants of the resolved dispute (parties, third parties). Objective limits extend the effect of the judgment to the court, state bodies, legal entities, and all other persons.

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[12] Art. 150 of the Commercial Procedure Code of the Russian Federation (hereafter – ComPC); Art. 220 of the Civil Procedure Code of the Russian Federation (hereafter – CivPC).

[13] Постановление Пленума Верховного Суда РФ от 19 декабря 2003 г. № 23 "О судебном решении," Бюллетень Верховного Суда РФ, 2004, № 2 [Decision of the Plenum of the Supreme Court of the Russian Federation No. 23 of December 19, 2003. On the Judicial Decision, Bulletin of the Supreme Court of the Russian Federation, 2004, No. 2].

5. Enforcement effect means that a judgment will be enforceable both voluntary and coercive only after it comes into force.

As a general rule, the legal effect of a judgment extends only to the parties and their successors. All consequences of the legal effect of a judgment refer to the parties to the dispute (or even only plaintiff). And only one characteristicc of the final judgment – binding effect – can be considered from the point of view of the party, who did not participate in the proceedings.

Art. 13 of the CivPC and Art. 16 of the ComPC state that the judicial acts of the court that have entered into legal force are mandatory for state authorities, local self-government bodies, other bodies, organizations, officials and citizens and are subject to execution throughout the territory of the Russian Federation.

The subjective limits of the judicial decision are a controversial topic in Russian legal science. The position towards subjective limits of the binding effect of a judgment depends on the theory of substantive or procedural nature of this decision itself. The procedural nature of the judgment means that through adjudication the court could achieve only procedural (formal) truth. The judicial decision (except for constitutive judgments that originate or terminate rights and obligation; *Gestaltungsurteile*) is only an act, that states that the plaintiff failed to prove his right or managed to do it in civil proceedings. From such procedure law point of view, a judicial decision can be applied only to the parties who participate in the proceedings. The judicial decision does not establish rights and therefore could not affect any rights, including the rights of the third persons. From this point, the judicial decision is only an instrument for coercive enforcement of the claim.

From the substantive theory of a decision, the binding effect of the judicial decision in the civil case is considered as all subjects on the territory of the Russian Federation are obliged to coordinate their behavior in according to the conclusion of the court concerning the legal relation stated by him.[14]

The external effect of the legal relation, and in particular the legal relation that has acquired legal certainty as a result of a judicial decision, may affect and, in practice, often affects rights and interests of the outsiders of the process, in particular:

1) the judicial recognition of the absolute rights (*rights in rem*) of one person (property rights, copyright) by the universality of the decision excludes the same right from any other person;

2) in the case of the origination of someone else's right from another (main) right, which is recognized or changed by the judgment, a change in the derivative right is caused.[15]

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[14] Комментарий к Гражданскому процессуальному кодексу Российской Федерации (постатейный) [Commentary to the Civil Procedure Code of the Russian Federation (Itemized)] 41–42 (G.A. Zhilin (ed.), Moscow: Prospect, 2003).

[15] Гурвич М.А. Избранные труды [Mark A. Gurvich, *Selected Works*] 618 (Krasnodar: Sovet. Kuban, 2006).

The decision of the court may affect the rights and obligations of third parties not only by the direct indication of such rights and obligations in a court decision but also indirectly, by determining the disputable legal relation on which a derivative legal relation with one of the parties is based. The decision of the court may become that legal fact by which the legal relation of the parties and the third party can arise, change or even terminate. In this case, as a general rule, the court decision should not directly determine such legal relation, since the court has to resolve the substantive dispute and determine only the legal relations that have arisen between the parties.

For example, in the event that a pledgee applies foreclosure of mortgaged property on the grounds provided for by law or by a mortgage agreement, all lease rights and other rights of use with respect to this property granted by the pledgor to third parties without the consent of the pledgee after the conclusion of the mortgage agreement are terminated. So when the court resolves the claim for foreclosure on pledged property, the rights of the tenants of mortgaged property and other persons are affected.

In the Decision of the Plenum of the Supreme Arbitration Court of the Russian Federation of July 12, 2012 No. 42 "On Certain Issues Related to Resolution of Disputes Related to Surety"[16] the Court indicated that when considering disputes between the creditor, the debtor and the guarantor who bear joint responsibility with the debtor, the courts should proceed from the fact that the creditor has the right to bring claims simultaneously to the debtor and the guarantor; only to the debtor or only to the guarantor. At the same time, the Court determined that the circumstances established in the dispute between the creditor and the guarantor, in which the debtor did not participate, are *taken into account* by the court when considering other disputes involving the guarantor and the debtor, for example, in the consideration of the recovery of the funds paid by the guarantor to the creditor. If in considering the dispute, the court will come to other conclusions than those contained in the judicial act in the case between the creditor and the guarantor, he must *indicate the relevant reasons*.

In theory, such idea is justified by the principle of "respect for the conclusions of the court contained in an earlier legally enforceable act."[17] Formally, such judicial decision would not have any prejudicial effect, as it fails the triple test (same parties).

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[16] Постановление Пленума Высшего Арбитражного Суда РФ от 12 июля 2012 г. № 42 "О некоторых вопросах разрешения споров, связанных с поручительством" [Decision of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 42 of July 12, 2012. On Certain Issues Related to Resolution of Disputes Related to Surety] (Mar. 19, 2017), available at http://www.arbitr.ru/as/pract/post_plenum/58414.html.

[17] Бевзенко Р.С. Комментарий к постановлению Пленума ВАС РФ от 12 июля 2012 г. № 42 "О некоторых вопросах разрешения споров, связанных с поручительством," 6 Вестник ВАС РФ 136 (2013) [Roman S. Bevzenko, *Commentary to the Decision of the Plenum of the Supreme Arbitration Court of the Russian Federation of July 12, 2012 No. 42 "On Certain Issues Related to Resolution of Disputes Related to Surety,"* 6 Bulletin of the Supreme Arbitration Court of the Russian Federation 136 (2013)].

However, the position expressed by the Court concerning "taking into account" the circumstances established in the dispute case in which the debtor did not participate demands special "credibility" for the court.[18]

The Russian case law has been developing in the way of admitting that it is possible that the judicial decision can affect the rights of the third party and gives such parties mechanisms to protect their rights, in case they consider that their rights were infringed by the judicial decision.

First of all, a judge *ex officio* has right to bring to trial any third party or in some cases co-defendant. Potential co-plaintiff and the third party with an independent claim should be noticed by the court about the current litigation, which gives such party the right to bring an action, which would be litigated in the same proceedings.

In case the decision affects the rights and obligations of the persons, which did not participate in the litigation, the judgment should be canceled by an appellate court. That will be so-called indisputable grounds to recall the judgment.

In some cases, the judge is bound by the law to bring such third party to the trial. For example, Art. 462 of the Civil Code of the Russian Federation establishes that if the third party brings a claim for the seizure of the goods on the basis that emerged prior to the performance of the sale contract, the buyer must bring the seller to the case, and the seller must enter into this case on the buyer's side. The seller who does not participate in the case would have no right to prove the wrong conduct of the case by the buyer.

2. Legal Effect of Arbitral Awards

The subject of *res judicata* before international arbitral tribunals has been discussed recently in plenty of works.[19] The International Law Association (ILA) at the 72th Conference of the International Law Association held in Toronto, Canada, 2006 considered the Final Report on *Res Judicata* and Arbitration as well as the Report on *Lis Pendens* and Arbitration by the Committee on International Commercial Arbitration.[20]

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[18] Бочарова Н.С. Институты interventio accessoria и quasi interventio в современном процессуальном праве, 4 Вестник МГУ. Сер. 11. Право 54 (2013) [Nataliya S. Bocharova, *The Institutes of Interventio Accessoria and Quasi Interventio in Modern Civil Procedure*, 4 The Moscow University Herald. Series 11. Law 54 (2013)].

[19] Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009); Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, 16(1) The American Review of International Arbitration (2005); Norah Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions* in *Pervasive Problems in International Arbitration* (L.A. Mistelis, J.D.M. Lew (eds.), Alphen aan den Rijn: Kluwer Law International, 2006); Audley Sheppard, *The Scope and Res Judicata Effect of Arbitral Awards*, Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI, October 15, 2004, Brussels 2005.

[20] Final Report on *Res Judicata* and Arbitration and Resolution No. 1/2006, Toronto Conference (2006) (Mar. 17, 2017), available at www.ila-hq.org.

ILA recommendations concern only the arbitral awards of the international commercial arbitration and do not touch the effect of the arbitral award to the proceedings in the state court. ILA admits that to promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings. The conclusive and preclusive effects of arbitral awards in further arbitral proceedings need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration. An arbitral award has conclusive and preclusive effects in further arbitral proceedings if:

a) it has become final and binding in the country of origin, and there is no impediment to recognition in the country of the place of the subsequent arbitration;

b) it has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings;

c) it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; and

d) it has been rendered between the same parties.

An arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to:

a) determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;

b) issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

The conclusive effects of an arbitral award can be invoked in further arbitration proceedings at any time permitted under the applicable procedure. The preclusive effects of an arbitral award need not be raised on its own motion by an arbitral tribunal. If not waived, such preclusive effects should be raised as soon as possible by a party.

Although Art. III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) does not expressly provide that arbitral awards have *res judicata* effect, a number of national courts have ruled that it has such a consequence in practice.[21] For example, a United States court ruled that "though the Convention does not expressly speak to the *res judicata* effect of an international arbitral award it reflects

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[21] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York: United Nations, 2016) (Mar. 13, 2017), available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf. *See also* Gary B. Born, *International Commercial Arbitration* 3394 (2nd ed., The Hague: Kluwer Law International, 2014); Andreas Börner, *Article III* in *Recognition and Enforcement of Foreign Arbitral Awards: A Global*

the principle that until it is successfully challenged, an arbitral award presumptively establishes the rights and liabilities of the parties to the arbitration."[22]

Art. V(1)(c) of the New York Convention establishes that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions *on matters beyond the scope of the submission to arbitration*, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced. In several jurisdictions parties to arbitration have brought successful challenges to enforcement of arbitral awards under this Article because the arbitral award addressed a party that was not bound by the arbitration agreement. Several courts have therefore considered that *ratione personae* is also a "matter" within the meaning of Art. V(1)(c) and can therefore constitute a valid basis for an Art. V(1)(c) challenge to recognition or enforcement of an award.[23] A United States District Court denied enforcement of part of an arbitral award under Art. V(1)(c) on the basis that the arbitral tribunal had "exceeded its authority when it purported to bind a non-signatory who was not expressly covered by the arbitration agreement."[24]

In some countries, courts have enforced arbitration agreements against parties that had not signed the arbitration agreement. For instance, United States courts have held that non-signatories can be bound by an arbitration agreement to the extent that the arbitration agreement is not null and void under the New York Convention and that a contract law theory – such as agency, estoppel, or principles relating to alter-egos and third party beneficiaries – applies to the case at hand.[25] In France, entities that had not signed the arbitration agreement have been referred to arbitration pursuant to the group of companies doctrine.[26]

Commentary on the New York Convention (H. Kronke, P. Nacimiento et al. (eds.), The Hague: Kluwer Law International, 2010).

22 *American Express Bank Ltd. v. Banco Español de Crédito S.A.*, Southern District Court of New York, United States of America, February 13, 2009, 1:06-cv-03484-RJH. *See also Gulf Petro Trading Company Inc., et al. v. Nigerian National Petroleum Corporation, et al.*, Court of Appeals, Fifth Circuit, United States of America, January 7, 2008, 06-40713.

23 *Supra* note 21.

24 *FIAT S.p.A. v. the Ministry of Finance and Planning of the Republic of Suriname, Suriname Rice Export Company N.V. et al. v. Alvaro N. Sardi*, District Court, Southern District of New York, United States of America, October 12, 1989, 1989 WL 122891, 4, para. 5.

25 *Supra* note 21.

26 *Société Kis France et autres v. Société Générale et autres*, Court of Appeal of Paris, France, October 31, 1989, 1992 Rev. Arb. 90.

When national legislation and arbitral rules[27] mention power or effect of an arbitral award they usually use term "binding" and especially notice that an arbitral award is binding for the parties of the arbitral agreement and dispute. Usually, case law in both common law and civil law countries recognizes that arbitral awards have the same or similar effect (*res judicata* effect). Nevertheless, such declarations in the judgment of state courts do not resolve multitude questions which arise in this field. There is no common unified rules or principles that settle such problems as 1) does an arbitral award has the same *res judicata* effect as state court decision; 2) does an arbitral award of the national arbitral tribunal has the same effect as an award of the international arbitral tribunal; 3) what law should be applied when the *res judicata* rules is employed (*lex arbitri* or *lex fori*) and others.

In Russia, the legal effect of arbitral awards of the national arbitration tribunals links only to the possibility to enforce it voluntarily.[28] It is useful to distinguish which effects arbitral award can have towards the litigation in state court (by the example of Russia). First, the arbitral award can be recognized and enforced by the state court by means of the state court in special proceedings (exequatur). During the process of recognition the state court examines the arbitral award and can refuse to recognize it on the grounds, established by the New York Convention. In this case, the arbitral award loses any effects. Second, an award can be set aside or suspend. Any participating party can challenge the arbitral award in the state court (Art. 230, part 2 of the ComPC, Art. 418, part 1 of the CivPC). Other persons have the right to challenge the arbitral award only if such a decision violated their rights and legitimate interests when it was decided upon their rights and obligations (Art. 4 of the ComPC, Art. 3 of the CivPC).[29] Third, the arbitral award has preclusive effect. The court should refuse to take action brought by the same plaintiff against the same defendant concerning the same claim, and same cause of action when preceding case was resolved by the arbitration tribunal and the final arbitral award was made.[30] Fourth, the court should return a claim to the plaintiff in case when the arbitral tribunal is judging the same claim of the same plaintiff against the same defendant.[31] It should be mentioned that procedure codes do not give the arbitral award a collateral estoppel effect, even when the triple identity test was passed.

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27 Art. 28(6) of the ICC Rules; Art. 26(9) of the LCIA Rules.

28 Федеральный закон от 29 декабря 2015 г. № 382-ФЗ "Об арбитраже (третейском разбирательстве) в Российской Федерации," Собрание законодательства РФ, 2016, № 1 (ч. 1), ст. 2 [Federal law No. 382-FZ of December 29, 2015. On Arbitration in the Russian Federation, Legislation Bulletin of the Russian Federation, 2016, No. 1 (part 1), Art. 2], Art. 38.

29 Курочкин С.А. Государственные суды в третейском разбирательстве и международном коммерческом арбитраже [Sergey A. Kurochkin, *State Courts in Arbitration and International Arbitration*] 139 (Moscow: Wolters Kluwer, 2008).

30 Art. 134 of the CivPC.

31 Art. 135 of the CivPC.

3. The Effects of an Arbitral Award towards Non-Participating Third Parties

Two main principles prevent us from expansion binding effect of an arbitral award to any non-party – *audiatur et altera pars* and party autonomy.

In the system of current legal regulation, arbitral award does not only creates an obligation for its execution by parties participating in the arbitration proceedings but also is a ground for the execution of certain legally significant actions by other persons.[32]

Art. 6 of the Decision of the Constitutional Court of the Russian Federation of May 26, 2011 No. 10-P establishes that within the meaning of Arts. 1 (part 1), 2, 18, 46, 55 (part 3) and 118 of the Constitution of the Russian Federation, the state obliges to create an effective system for the protection of constitutional rights and freedoms through justice, an integral part of the normative content of the right to judicial protection, which has a universal character, is the right of interested persons, including those not involved in the case, to apply to court for the protection of their rights violated by an unjust court decision.

In accordance with the current legal regulation in Russia, in cases where an arbitral award affects rights and obligations of persons who did not participate in the arbitration proceedings, such persons have the same legal means to protect their rights, which are provided for protection of the rights of the third parties whose rights were affected by a decision of state court. First of all, they have right to bring an independent action to the competent court, as well as to challenge the arbitral award, which is beyond the scope of the private two-party dispute.

In case law of commercial courts, persons who did not participate in arbitration proceedings are considered eligible to apply to the commercial court for the protection of their rights violated or disputed as a result of the decision of the arbitral tribunal on the basis of Art. 46 of the Constitution of the Russian Federation and Art. 4, part 1 of the ComPC.[33]

In contrast to the decisions of state courts enforceability of the arbitral awards is vested only after exequatur proceedings. These proceedings involve checking for proper, law-based formation of the arbitral tribunal, observance of procedural guarantees of the rights of the parties and compliance with the decision of the arbitral tribunal with the fundamental principles of Russian law, i.e. for compliance

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[32] Постановление Конституционного Суда РФ от 26 мая 2011 г. № 10-П [Decision of the Constitutional Court of the Russian Federation No. 10-P of May 26, 2011], Art. 4 (Mar. 30, 2017), available at https://rg.ru/2011/06/08/ksrf-dok.html.

[33] Постановление Президиума Высшего Арбитражного Суда РФ от 8 декабря 2009 г. № 12523/09 [Decision of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 12523/09 of December 8, 2009] (Mar. 30, 2017), available at http://www.arbitr.ru/as/pract/post_pres/1_1_a269e324-0f71-4fb5-be35-c40bee123ce3.html.

of this private law by its nature act to those requirements that are required by law for the purposes of compulsory execution.

Such verification is carried out only by the state court (general jurisdiction or commercial) in the procedures established by the procedural legislation – Chapter 47 of the CivPC and Chapter 30 of the ComPC – for issuing an enforcement order for the enforcement of the arbitral award, and only if the arbitral award is not executed by the debtor voluntarily. At the same time, the competent court can refuse to issue the writ of execution in the cases specified in Art. 426 of the CivPC, Art. 239 of the ComPC, including if it determines that the dispute cannot be the subject of arbitration proceedings in accordance with federal law and (or) arbitration decision violates the fundamental principles of Russian law. Therefore, if the arbitral tribunal resolved the issue of the rights and obligations of persons who did not participate in the arbitration proceedings and did not give consent to it, this circumstance is the basis for refusing to issue a writ of execution for compulsory execution.

Therefore, if the arbitral tribunal resolved the issue of the rights and obligations of persons who did not participate in the arbitration and did not consent to it, this circumstance is the basis for refusing to issue the writ of execution for compulsory execution. Such arbitral award firstly, contains decisions on matters beyond the scope of the arbitration agreement, i.e. does not comply with the law, and secondly – violates the fundamental principles of Russian law, which, by virtue of Art. 46 (part 1) of the Constitution of the Russian Federation, includes the right of everyone to participate in a process that deals with questions about his rights and obligations.[34]

In addition, in the current mechanism of judicial control, the decision of the commercial court for the issuance of the writ of execution for the enforcement of the arbitral award, which resolved the issue of the rights and obligations of persons who are not parties to the arbitration proceedings, and thereby violated the law can be appealed directly by these persons to the arbitration court of the cassation instance in accordance with Art. 42, Art. 240, part 5 and Art. 273 of the ComPC.

Prof. Brekoulakis explained that a prior arbitral award should have *certain* preclusive and conclusive effects on related third parties, i.e. parties who have not signed the arbitration agreement nor taken part in the prior arbitration process, but who have a close contractual link to the parties in the prior arbitration because of the limited possibilities to join related parties in arbitration proceedings.[35] Prof. Brekoulakis agreed that a third party still would have right to bring an action in a separate arbitration against one of the parties. Also, the arbitral award cannot be enforced by or against the third party. However, a related third party should be bound in subsequent arbitration proceedings by final determinations of legal and factual issues that are common to both proceedings. It is offered to grant arbitral

[34] *Supra* note 32, Art. 6.2.

[35] Brekoulakis 2005, at 13.

tribunals right to decide whether a related third party should be bound by the legal and factual determinations of the prior tribunal.[36]

This position should be partially accepted. An arbitral award can have some effect towards a third nonparticipating party. To determine this effect the comparative method could be used. Both *res judicata* and legal effect doctrines give us a variety of situations when the judicial decision would affect the right of the third party even in the case when such party did not participate in the proceedings. It is supposed that such different cases need different approach how the state court, arbitral tribunal or such third party should consider the arbitral award which affects the rights or interests of the non-participating party.

The following cases can be listed.

1. An arbitral award in it's the operative part directly stated the rights and obligation of the third party.

This is the gross violation of the principle to be heard, the idea of adversarial proceedings and the party autonomy principle. This part of the arbitral award that violates the core principles of arbitration should be considered as void. There is no need of any special proceedings to annul such award. The third party, parties, arbitral tribunals and state court should ignore such part of the arbitral award.

2. An arbitral award indirectly affect the rights and obligation of the third party in case when 1) the third party is a privy of one of the party; 2) the arbitral award is an award *in rem*; 3) the arbitral award has another effect on the rights of the third party, resulted from any substantive legal connection (including contractual one) between party of arbitration and the third party.

In these cases to guarantee the stability of arbitral award, the authority of arbitration itself, the balance of the rights of parties and non-parties in arbitration the arbitral award should have some limited effect towards non-parties. First of all, such third non-parties should consider that the rights and obligation of the parties to the dispute were established by the final arbitral award and their derivatives rights and obligation could have originated, terminated or changed. They should respect and obey such decision and further in their legal relation proceed from the assumption that the rights and obligation of the party of a dispute are the same as the arbitral award stated. It is essential to emphasize here that only question of rights, obligations, legal interests and the legal relation is accounted. The third non-party is not affected by collateral estoppel effect or any other consequences of *res judicata* or legal effect of the arbitral award. The conclusion concerning rights and obligation is what only matter here. The state court or arbitral tribunal has no right to reassert the question of rights, obligation, and interests of the parties to the primary arbitration proceedings as far as such rights and obligation was already stated by the arbitral tribunal.

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[36] Brekoulakis 2005, at 13.

The reasoning to such point is the following. The developing of arbitration itself follows the path of convergence of the state litigation and arbitration. There is no reason why an arbitral award should be considered as a less reliable act than the act of the state court. The legislation of most countries admits and support "private" adjudication. The New York Convention guarantees the coercive enforcement of arbitral awards without any verification of their lawfulness and reasonableness. With the aim of procedural economy, legal certainty, avoidance of parallel proceedings and conflicting decisions the binding effect of the arbitral awards towards third parties should be recognized.

From the substantive point, the rights of the third party can be derivative from the rights of the party. This dependence was originated not by the arbitral award, that only acknowledged them, but by the substantive legal relation between party and non-party. When the third party refuses to admit the binding effect of the arbitral award it at the same time negates the legal relation between him and the party.

Such point can to some extent be compared with the French law concept of "opposabilité aux tiers," which means that a party in arbitration may have to respect an award rendered between other parties in a prior arbitration that finally decides the rights and obligations of those parties. The prior award has *res judicata* effects only between the parties to the prior arbitration. However, the parties to the prior award should be allowed to rely on the award in the subsequent arbitration against the related third party to the extent that it finally determines the legal situation between them. Conversely, the third related party should also be allowed to invoke the conclusive effects of the prior award in the subsequent arbitration against the parties to the prior award.[37] The application of the "opposabilité" principle seems appropriate. If a prior award finally decided the legal situation between A and B, a subsequent arbitral tribunal seized of a related dispute between A, B and C (or only A and C) should be bound by that prior award if the legal situation between A and B arises before it again as a preliminary issue. The prior tribunal had a greater interest in determining the legal situation between A and B than the subsequent tribunal. The same should apply where the legal situation between A and B was finally decided in a prior judgment.[38]

The third party in concerned cases should have legal instruments to protect his rights and interests. The adequate mechanism is offered by Russian case law when the third party can challenge the arbitral award in the state court. But in this case, the non-participation of the third party could not be unconditional ground to cancel the arbitral award. The third party should prove that his participation could have changed the outcome of the arbitration proceedings, which the third party can bring to the court issues and evidence that result in other decision of the arbitral tribunal.

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[37] Pierre Mayer, *Litispendance, connexité et chose jugée dans l'arbitrage international* in *Liber Amicorum Claude Reymond: Autour de l'arbitrage* 151 (Paris: Litec, 2004).

[38] Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* 236 (Oxford: Oxford University Press, 2016).

It is reasonable to quote here the main reasoning of the opponents of the theory of the binding effect of an arbitral awards: 1) an arbitration proceedings are only possible between the parties involved in arbitration agreement; 2) the withdrawal of arbitration tribunal beyond the limits of the arbitration agreement is a ground reason for canceling the arbitration award; 3) arbitration awards do not prevent third parties to bring claims on the same subject or on the same and cause of action to the state courts; 4) arbitration awards do not have a collateral estoppel effect for subsequent judicial proceedings, so the third party do not constrain by the arbitral award; 5) the core of arbitration is the consent of all parties to the arbitration proceedings. This principle of arbitration, in particular, implies that the intervention of a third party is possible only with the consent of both the disputing parties and this person involved. If a third party did not participate in arbitration proceedings, it can in no way be connected with the rendered award.[39]

Such criticism of the idea of the binding effect of the arbitral award for the third parties do not take into consideration the following: 1) the idea of the respect to the arbitral award: the same substantive effect to the rights of all parties and non-parties should be given to the arbitral award as judicial decision has; 2) the principle of procedure economy should prevent the third party from the re-litigation of the same issues; 3) the possibility of parallel proceedings and other abuse should be excluded. It is also worth to be mention that the idea of only procedural nature of the judicial decision and arbitral award is peculiar to the modern German legal science (as the judicial decision could not have any substantive effect on the third party and such party could not have any right to challenge this decision by any means but by bringing separate special claim (Art. 772 of the German Civil Procedure Code[40])).

Conclusion

The development of private commercial relations could lead to the situation that it will be impossible to deliver an arbitral award that does not affect any third party. The complexity of the legal relations can result in the disability of arbitration itself as far as the arbitration does not have the same mechanisms of involvement of third parties.

It means that with the purpose of the possibility of arbitration, the stability of arbitral awards and legal certainty we should presume that an arbitral award can affect rights and obligations of third parties even if they do not participate in the arbitral proceedings.

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[39] Асосков А.В., Курзински-Сингер Е. Пределы действия судебных и третейских решений по кругу лиц, 2 Вестник ВАС РФ 108 (2012) [Anton V. Asoskov, Evgeniya Kurzinski-Singer, *The Subjective Limits of the Power of the Judicial Decisions and Arbitral Awards*, 2 Bulletin of the Supreme Arbitration Court of the Russian Federation 108 (2012)].

[40] Code of Civil Procedure as promulgated on December 5, 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Art. 1 of the Act dated October 10, 2013 (Federal Law Gazette I page 3786).

And such third parties should "suffer" or "enjoy" such effect of "alien" arbitral award as long as they do not challenge this arbitral award in the state courts.

Moreover, we believe that the right to challenge such award should be executed in accordance with the principles of party autonomy and adversarial procedure. It means that the state court *ex officio* could not overrule the arbitral award even if it ascertains that the arbitral award affects the rights and obligation of any third party. The state court can overrule the arbitral award only if such third party itself challenge the arbitral award and in adversarial proceedings prove that his rights or obligation were affected.

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THE DEVELOPMENT OF RUSSIAN LEGISLATION RELATING TO THE PROTECTION OF THE RIGHTS OF SEPARATED PARENTS AND THEIR CHILDREN

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The following article deals with the challenges created by legal regulations concerning divorced or separated couples and focuses on the rights of separated parents with children. The article analyzes the problems associated with law enforcement practices in this area, the gaps in existing family law, as well as the disputed aspects of theory concerning parents' legal relations. Suggestions for legislative developments in Russia concerning the protection of family rights within separated families are given. The authors of this paper argue for a rethink of existing approaches to legal regulations in this field of law due to the fact that existing family legislation does not take into consideration many of the challenges and realities of modern parenthood. Furthermore, current legal regulations in Russia do not fully correspond to international legal norms. The authors contend that this will lead to the curtailment of the legal rights of the separated parents. Such status is characterized, on the one hand, by unreasonable restrictions on parental rights. On the other hand, it permits only a limited degree of responsibility for a child's upbringing and financial support on the part of a parent living separately from their child. The authors propose that, in this respect, it is necessary to rethink disputed legal decisions relating to family law and the implementation of family law in practice. By analyzing such implementation, the authors single out a number of interrelated factors that must be overcome in order to effectively protect separated parents' relationships with their children. The aim of the article is to initiate a new approach to parental legal relations after divorce or separation and to propose new legislative regulations concerning the legal status of a parent who lives separately from their child. New developments in family law are proposed in order to ensure a balance between parental responsibilities and rights as well as the rights of the child.

Keywords: parental rights; children's interests; protecting family rights; parental legal regulations; problems of legal regulation; separated parents; visitation rights; establishing a child's residency.

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Table of Contents

Introduction

Parent-child relationships are both natural and legal, and reflect the most characteristic traits of family relationships. Therefore, research of such issues is of primary importance for the development of doctrines/concepts of family law. Nevertheless, the concept of parental relationships is underdeveloped and represents a significant problem leading to multiple challenging issues of family law in both theory and practice. In recent years, there has been a growing emphasis on the problematic legislative and procedural issues in family-related cases and court decisions concerning the process and consequences of divorce and termination of parental rights. It should be noted that the most essential legal norms of the Civil Procedure Code are connected with the court's activities dealing with divorce and termination of parental rights.[1] The study of imperfections of the Family Code of the Russian Federation (hereinafter – RF Family Code) of 1995 and the necessity of modifying the code has become an important focus of current legal research.[2]

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[1] *See* Dmitry Maleshin, *The Russian Style of Civil Procedure*, 21(2) Emory International Law Review 545 (2007) (Apr. 20, 2017), also available at http://papers.ssrn.com/abstract_id=2208488.

[2] *See* Nadezhda Tarusina, *European Experience and National Traditions in Russian Family Law*, 2(3) Russian Law Journal 97 (2015).

Modern family legislation is based on disputed ideas relating to the structure and dynamics of parental relationships developed during the Soviet period. Because of this, the application of the law in practice is not only controversial, but also slow, dragging behind the needs of modern society. The area of family law dealing with the legal rights of separated parents is among the most challenging and disputed. These arguments are explained by a conflict of interests of parents, who often use these realities to their own advantage, much to the detriment of the child. For example, having separate residencies is a major manipulative factor in the increase or decrease of parents' influence on a child.[3] Parental conflict in intercultural families is particularly strong; it is no wonder that the protection of children's and parent's rights in intercultural marriages is given high priority by the government in the family policy in the Russian Federation.

One of the consequences of the problems of legal regulations relating to separated parents and children are cases of kidnapping. As we have seen time and time again, family disputes can become ugly; indeed, when some of these disputes between parents regarding a child's abode and access escalate, some parents even resort to kidnapping. Since 2011, Russia has participated in the Convention on the Civil Aspects of International Child Abduction (established in The Hague, October 25, 1980).[4] A number of legal steps were made to strengthen parental responsibilities. While the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children was signed in October 1996, it was not until 2012 that European states began adopting the regulation into the legal jurisdictions of Europe.[5] Russian family law has not yet adopted these rulings in accordance with the above documents. Unfortunately, Russian family law is not consistent with international family law regulations dealing.

Though the problem of separated parents and protecting their children's rights is given much emphasis by the Russian Government and by legal theorists in Comparative Law,[6] systematic and integrative research in this area has not yet been undertaken. For instance, there is only one monograph focusing on the development of a more effective legal mechanism of parental legal rights regulation and it was

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[3] Старосельцева М.М. Осуществление и защита родительских прав по семейному законодательству Российской Федерации: Дис. … канд. юрид. наук [Marina M. Starosel'tseva, *Implementation and Protection of Parental Rights as Reflected in Family Legislation of the Russian Federation: PhD thesis*] 46 (Moscow, 2009).

[4] Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.

[5] Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

[6] Лялина Н.В. Содержание, осуществление и защита прав родителя, проживающего отдельно от ребенка в Российской Федерации, в Соединенных Штатах Америки: Дис. ... канд. юрид. наук [Natalia V. Lyalina, *Contents, Implementation and Protection of the Rights of a Parent Living Separately from the Child in the Russian Federation and in the United States of America: PhD thesis*] (Moscow, 2006).

published back in 2010.[7] This means that critical theoretical issues relating to the matter in question have not yet been properly researched and some suggestions proposed by researchers as a result of their exploration of general and integrative issues in this area do not provide a strong rationale for updating the legal basis of family law.

Modern family law theory refers to the existence of "classical parental legal relations"[8] as well as parental legal relationships with the participation of a separated parent. Judging from these definitions, a lack of common residence should be included among the legal facts that would change the essence of the parental relationship itself. Such interpretation of the meaning of a child and a parent living separately is debatable. From our point of view, the idea of a "classical parental relationship" may be a source of a breach of both the rights of a child and the rights of a parent residing separately as the amount of rights of the latter one may reduce even due to his/her being physically apart from a child.

Taking the above into consideration, the goal of this article is to develop a concept meant for the improvement of a protective legal mechanism for separated parents and their children.

The aims of this paper are as follows:

Firstly, it aims to set out the legal status of a separated parent and, for the first time in Russian family law, argue that a separate residence of a parent should not limit parental legal relations. The meaning of this theoretical conclusion is wide-ranging because, at its core, the entire legal practice, which includes the curtailed rights of a separated parent, provides legal limitations for a separated parent's rights. As a result, it infringes both the interests of the parent and the child.

Secondly, this research works to develop key recommendations for the Russian legal system with regard to cases of a separated parent forgoing their parental obligations concerning the upbringing of, and provision for, a child. Nonetheless, even such cases are not considered reason enough to deny that parent their parental rights. Implementing these recommendations will ensure a balance of interests concerning the legal regulations relating to the rights of separated parents and their children.

Thirdly, the research aims to investigate factors which are not connected with such legal recommendations concerning a separated parent but which still hinder the effectiveness of legal mechanisms aimed at protecting children's interests upon the dissolution of the family. The researchers propose ways to implement modern family law with a view to increasing its efficacy.

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[7] Громоздина М.В. Осуществление родительских прав при раздельном проживании родителей по законодательству Российской Федерации: Дис. ... канд. юрид. наук [Maria V. Gromozdina, *Implementing Parental Rights of Parents Living in Separation in the Legislation of the Russian Federation: PhD thesis*] (Moscow, 2010).

[8] *Id.*

1. Methodology

The authors employ qualitative methods, including systemic and structural analysis with the goal of identifying the impact of separate parental residences, paying special attention to the dynamics of parental legal relations. The authors also employed a historical analysis of laws and norms relating to child-parent legal relations. The researchers also use the comparative law method to define the main trends concerning the relevant rights of separated families. Logical methodology, such as deduction and generalization, was used for the theoretical interpretation of empirical facts in an effort to work out new provisions for legislative development in the challenging areas of children's legal relations with non-resident parents within split families.

2. The Challenges for a Separated Parent Exercising Their Parental Rights

In the post-Soviet legal sphere, there has been a broad discussion about an apparent discrimination against fathers concerning their rights to decide the living arrangements of their children following a divorce. Russian courts tend to have a far higher number of female judges than many other countries, and the same can be said for women's employment in legal bodies that deal with child custody. An analysis of court decisions shows that courts tend to favor women when deciding upon the living arrangements of a child and, therefore, the rights of the divorced or separated parent. Although legal entities do not view the protection of fathers' rights as a critical issue, the increasing number of fathers' rights initiatives presently emerging suggests that it is indeed an important legal issue. Respectively, when "considering a child's interests, age, opinion, as well as the personal and moral qualities of the parents, the court is enabled to solve the dispute in favor of the father."[9] Similar situations with fathers' rights arise in other countries. It is stressed that "the courts are biased against dads."[10] Biased court opinions concerning fathers' rights for custody and access to their children after divorce or separation led to the "Angry Fathers Movement" in the UK.[11]

The reason for this is that fathers have no rights in the UK. Instead, the law refers to parental responsibilities. Fathers' rights to see their children are not set out in the UK law as such, but include parental responsibility which gives them the right to contribute to decision making regarding the child's future. On the contrary, in Scotland parental responsibilities and rights is a legal status that means that they have a duty to care for and protect the child.

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[9] Архив Ленинского районного суда г. Тюмени. Гражданское дело № 33-6465/2016 [Archive of the Leninsky District Court of the Tyumen City. Civil Case No. 33-6465/2016].

[10] Available at https://www.dad.info/divorce-and-separation/fathers-rights-and-law/fathers-rights-to-see-their-children-law-in-the-uk.

[11] *Id.*

Nevertheless, a review of recent law enforcement practices shows an imbalance in the exercise of parental rights between separated parents may be explained by the fact that law enforcement regulations are not always in keeping with the RF Family Code. As a result, that leads to the creation of the special legal status for the separated parent. Such a status may be considered "curtailed" because it is characterized, primarily, by fewer rights compared to those of parents living with the child.

In custody cases, judges tend to be more concentrated on determining the place of the child's accommodation, even asking for the child's opinion on the matter, than ensuring that the child will be able to communicate with both parents. Here is an example from court practice that demonstrates the imperfect and illogical nature of some court opinions:

> a child has established steady social links with the local environment in the location in which he used to live with his father and to sever these links would have a negative impact on the child. This is why his mother filing a suit to establish a place of living for the child in her favor despite her own not having the right to do so means that she rejects the possibility of civilized communication between her child and his father due to either her personal interests or selfish motives.[12]

That is why, considering the mother's interest "selfish," the court ruled, "to deny the claim to accommodate the child with his mother."[13] In our view, rather than the claim being the result of selfish motives, this is an example of a parent striving to live with her child.

It is not unusual that among the agreements reached and court opinions determined, one can come across several in which the right of one parent to communicate with his/her child is dramatically curtailed and takes place "every Saturday, from 10 a.m. till 7 p.m. either on neutral territory or at the living address of, but not in the presence of, the child's mother."[14] If the parental rights of a separated parent are not restricted, one would assume that his/her communication with a child may and should be the same as it used to be. Nevertheless, analysis of law-enforcement practice reveals that this is far from the case. As a rule, even a law-abiding, divorced or separated parent has to stick to a rigid child attendance schedule.

For example, a court of a higher instance revoked a lower court's decision that gave a separated father the right to see his child on a daily basis. The case was filed for retrial on the grounds that, "the court opinion in question was unenforceable

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[12] Архив Калининского районного суда г. Тюмени. Гражданское дело № 2-137-09 [Archive of the Kalininsky District Court of the Tyumen City. Civil Case No. 2-137-09].

[13] *Id.*

[14] Архив Ленинского районного суда г. Тюмени. Гражданское дело № 2-1025/2017 [Archive of the Leninsky District Court of the Tyumen City. Civil Case No. 2-1025/2017].

since it did not specify the days, holidays, and the vocational periods for meetings or the timing and location thereof."[15] We do not believe a court decision should oblige a separated parent either to have access to a child only on fixed dates or limit his/her access on other dates for it represents a fundamental limitation of the rights of separated parents. The limitation or termination of parental rights may take place only in keeping with the Arts. 69 and 71 of the RF Family Code.

Even if these meeting details are set out in a legal opinion, the implementation of separated parent rights may be seriously hindered by another parent living together with a child who may continuously undermine the relationship between a child and the separated parent, by instilling a negative attitude towards him/her. Here is a typical example from a statement of claim of March 2015 brought to the Lower Instance Civil Court in Tyumen,

> Due to the personal enmity between me and the defendant, she does her best to obstruct my contacts with our daughter, saying that I will never see her again. I have no chance to visit the child at the residential address of the defendant as she never opens the door for me there and becomes abusive.[16]

There is no legal basis for negative legal consequences, even in case of breaching the attendance schedule, which was prescribed either by a negotiated agreement or ordered by a court decision (e.g., if the court ordered Thursdays as meeting days but a parent visited the child on another day).

Evidently, such conflicts have a traumatic impact on a child. This analysis of the case materials notes that

> the Parties repeatedly breached the conditions ordered by the court on the basis of parental negotiation determining the arrangements for access to the child. That resulted in both the plaintiff and defendant's approaching bailiff services, child protection services, and the police. As a result, according to the conclusion of the NGO Family Center [Tyumen] the child developed a sense of alarm, non-productive neurosis, and psychological tension due to the constant movement from his mother's to its father's residence, as well as due to the changes in their daily schedule. In order to rehabilitate the physical and emotional health of the child, it is critical to enable him to communicate with both the mother and the father.[17]

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[15] Определение Московского городского суда от 28 ноября 2011 г. по делу № 33-38737 [Decision of the Moscow city court of November 28, 2011 on case No. 33-38737].

[16] Архив Центрального районного суда г. Тюмени. Гражданское дело № 14-8987/ 2015 [Archive of the Central District Court of the Tyumen City. Civil Case No. 14-8987/ 2015].

[17] Архив Калининского районного суда г. Тюмени. Гражданское дело № 2-257-11 [Archive of the Kalininsky District Court of the Tyumen City. Civil Case No. 2-257-11].

The issue of psychological tension of a child and trauma to his mental, emotional and physical health is stressed in a number of articles by foreign authors.[18]

The above situation corresponds with the position demonstrated by the practices of the European Court of Human Rights. For example, in the case *Johansen v. Norway*, August 1996, it was pointed out by the European Court of Human Rights that if a child is deprived of the opportunity to communicate with one of his parents, it can lead to irreversible consequences for his or her mental state.[19] Similar issues are referred to in articles on the mental trauma of children, which point out that children's trauma symptoms increase in case of parental divorce or separation.[20]

We assert that the courts should have legal leeway to not only consider the claims of the parents and their wishes as to the residential rights of a child, but also to make the decision based on the child's welfare, specifically their ability to communicate with both separated parents. In this respect, we suggest including this stipulation in Art. 24 of the RF Family Code. This will strengthen the legal guarantees of those children who were born out of wedlock because current legislation considers that the court is supposed to decide only upon the legal rights of children who were born within legal marriages.

In view of the above, we also consider it reasonable to amend Art. 66 of the RF Family Code in order to include rules that the separation of a parent should not change his or her parental rights and responsibilities. We are of the opinion that this will work to "strengthen the guarantees and rights of good parents to have access to their children, even if one of them is separated."[21]

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[18] Alicia Summers et al., *Terminating Parental Rights: The Relationship of Judicial Experience and Expectancy-Related Factors to Risk Perceptions in Child Protection Cases*, 18(1) Psychology, Crime and Law 95 (2012); Liz Trinder, *Competing Constructions of Childhood: Children's Rights and Children's Wishes in Divorce*, 19(3) Journal of Social Welfare and Family Law 291 (1997).

[19] *See Johansen v. Norway*, App No. 17383/90, Case No. 24/1995/530/616, ECHR1996-111, [1996] ECHR 31, (1997) 23 EHRR 33.

[20] *See* Katelyn Donisch et al., *Child Welfare, Juvenile Justice, Mental Health, and Education Providers' Conceptualizations of Trauma-Informed Practice*, 21(2) Child Maltreatment 125 (2016); Penelope Welbourne & John Dixon, *Child Protection and Welfare: Cultures, Policies, and Practices*, 19(6) European Journal of Social Work 827 (2016); Laura E. Brumariu & Kathryn A. Kerns, *Mother-Child Emotion Communication and Childhood Anxiety Symptoms*, 29(3) Cognition & Emotion 416 (2015); *Development and Implementation of a Child Welfare Workforce Strategy to Build a Trauma-Informed System of Support for Foster Care*, 21(2) Child Maltreatment 135 (2016).

[21] Экспертное заключение по проекту Концепции совершенствования семейного законодательства Российской Федерации и Предложений по совершенствованию семейного законодательства (принято на заседании Совета при Президенте РФ по кодификации и совершенствованию гражданского законодательства 7 июля 2014 г. № 132-1/2014) [Legal Opinion on the Concept of Improving of Family Legislation of the Russian Federation and Improving of Family Legislation Motions of the Presidential Council for Codification and Improvement of the Civil Legislation of July 7, 2014 No. 1321/2014] (Apr. 20, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=129293#1.

3. Challenges Concerning the Exercise of Guardianship Rights and Responsibilities of a Separated Parent

It is clear that the flaws in modern family law can lead to the curtailment of responsibilities of a separated parent.

Practice shows that a good parent would forego some of his/her own needs for the sake of a child's in extraordinary circumstances.

Retrospective analyses of parental responsibilities concerning child maintenance speak about its unconditional character. Moral responsibilities oblige parents to take care of their children until they come of age.

Pre-revolutionary lawyers stressed the fact that parents are obliged to take care of a child even at the expense of completely ignoring their own needs. This has served as a strong legal foundation for payments to children known as child support.

If one of the parents is forced to pay for a child's financial support, it is always the parent living separately from the child. Courts tend to mandate that parents pay a certain percentage of their income as a mandatory alimony to their child, whereas a fixed sum of financial support payment is less often enforced by the courts and is looked at as a thing of secondary importance.

Art. 81 of the RF Family Code determined the shares of the income or salary of the financial support payer if he/she is a divorced and separated parent (i.e., not living with the child). These shares have been fixed in family legislation since 1936 in order to overcome situations in which the amount of the support was insufficient compared to the income of the payer. The law was aimed at the following: a) preventing a disproportion between the possibly increasing income of the paying parent and a fixed level of financial support, and b) promptly concluding court decisions. Nevertheless, irrespective of the forms of child support payment, in Russia, in practice, the support payer often either fails to disclose his/her income or transfers the rights to his/her property ownership to their close relatives, etc. Similar issues often arise in international practice.[22]

Regarding the liability of the parent avoiding alimony payments the practice of avoiding paying alimony by making regular minimum payments is widespread. In such cases, the payer is not liable under the Criminal Code on the ground of gross violation of alimony payment or under Art. 69 of the RF Family Code on the ground of avoiding execution of parental obligations. Such approach is not consistent with the principle of the child's welfare and development. Therefore, such parents manage to avoid criminal punishment and deprivation of parental rights for evading parental responsibilities under the Criminal Code of the Russian Federation or under Art. 69 of the RF Family Code. Such practice does not correspond to the principles of caring for

[22] Shelley Morrison, *In Care, Aftercare and Caring for Those in Care: My Successful Care Journey*, 22(2) Child Care in Practice 113 (2016).

a child. Children who have not yet come of age cannot support themselves without their parents, which is why financial support serves as the only source to satisfy their needs. Additionally, the above mentioned alimony-related norms distort the equality of parental rights in which one of the parents takes full care of the child and the other pays only a small part of his income for the child's care and only when the source of his income is legally proven. It is evident that a parent does not stop being a parent even if he separates from a child, which means that he should stick to the principle of parental equality even in caring for a child. Also, much debate about parental responsibilities has arisen in international legal research.[23]

Moreover, court practice shows that if one of the separated parents is legally married to another person, the conditions of his/her alimony payment grow more complicated. For example, there are some Russian Constitutional Court decisions that state the priority of current marital status over parental responsibilities for illegitimate child maintenance. To illustrate this fact we can use the example of the court claim filed by the spouse of Mr. X. and adjudicated by the Nevsky District Court, Saint Petersburg, in 2016. The court based its opinion on Art. 35(3) of the RF Family Code, which provided that a consent and a power of attorney of a spouse is obligatory for any kind of transaction made by the other spouse, and concluded that this ruling does not infringe the constitutional rights of the citizens. Beyond that, according to law enforcement practices, if a separated parent gets married, it becomes more complicated for him/her to pay alimony to a child given his/her new family status (primary or secondary caretakers of a new family). Even the opinions of the Russian Constitutional Court concerning childcare prioritize the rights of legally married (even if newly separated) couples over cohabiting couples. For instance, Ms. N.V. Vidman applied to the Constitutional Court of the Russian Federation (Saint Petersburg) expressing her disagreement with Art. 35(3) of the RF Family Code.[24] She claimed that it discriminated against the rights of illegitimate children hoping to obtain sufficient provisions based on parental consensus. The reason for this claim rests with the fact that the Nevsky District Court (Saint Petersburg) rejected the agreement relating to the alimony payment for the underage daughter of Ms. Vidman and Mr. X.[25]

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[23] Ruth Weston & Margaret Harrison, *"Divorced Parents" Understanding of Their Rights and Responsibilities towards Their Children*, Paper delivered at the Third Australian Family Research Conference, hosted by the Australian Institute of Family Studies, held at Ballarat College of Advanced Education, 26–29 November 1989.

[24] *See* the case of *Vidman v. X*. X was cohabited with Ms. Vidman and the couple had an illegitimate child. Ms. Vidman filed a complaint to the Constitutional Court of the Russian Federation claiming that the previous Lower Instance court decision that ruled that the agreement between her and X, who consented to pay alimony for their child had violated the ruling of Art. 35 of the RF Family Code. The reason for such a decision was that the current legal wife of Mr. X forbade him from paying alimony and, as a result, the lower court ruled that their agreement shall be nullified.

[25] Определение Конституционного Суда РФ от 9 декабря 2014 г. № 2747-О «Об отказе в принятии к рассмотрению жалобы гражданки Видман Натальи Владимировны на нарушение ее

Later on, monetary payments exceeding the amount of alimony prescribed by law could only usually be enforced if a divorced spouse agreed to such condition. Also, legally, the income of the alimony payer is treated as the common property of the spouses (Art. 34 of the RF Family Code), except in cases of alimony payment from the sources of individual property of one of the spouses (Art. 36 of the RF Family Code).

On the whole, we consider that the statement of the Constitutional Court of the Russian Federation that Art. 35(3) of the RF Family Code does not infringe upon parental rights. However, the fact that this ruling requires the prospective alimony-paying parent to submit his/her agreement to do so and the pending approval of the power of attorney may hinder the voluntary payment of alimony, making it, in some cases, unrealistic, if not impossible. Furthermore, a new spouse of a separated parent who does not want to reduce their common property may not be willing to give his/her current spouse consent to use their common finance to maintain a child from a previous marriage.

We believe it is reasonable to enforce a mechanism to prevent competitive norms concerning the disposition of spouses' common property in cases dealing with alimony issues. Child support obligations, including voluntary ones, are of a personal nature. That is why they cannot be passed over to a legitimate heir. Also, Art. 45 of the RF Family Code differentiates between personal and common obligations of spouses and does not require agreement on personal responsibilities for a previous spouse with the current one.

That means that a negotiated agreement on paying financial child support should not be considered a transaction with the common property of the spouses, and shall not require justification of the power of attorney. For example, mediation and negotiation plays a pivotal role in out of court conflict resolution between separated or divorced parents in foreign countries.[26]

In the above case of Ms. Vidman, the defendant should have initiated to take the alimony of the obligator from the split of the spouses common property. That would be in keeping with Arts. 38 and 45 of the RF Family Code. It is evident that the provision of stability in marriages should be carefully regulated; however, parental and marital status tend to compete with one other and which one prevails is decided on the basis of family law rules that are in force. That means that the existence of the new family should not abolish the responsibilities of the previous family and

конституционных прав и конституционных прав ее несовершеннолетней дочери пунктом 3 статьи 35 Семейного кодекса Российской Федерации» [Decision of the Constitutional Court of the Russian Federation No. 2747-O of December 9, 2014. On Rejection of Application by Ms. Vidman Regarding the Acceptance of her Complaint against the Violation of her Constitutional Rights and the Rights of her Underage Daughter under Article 35(3) of the Family Code of the Russian Federation] (Apr. 20, 2017), available at http://www.garant.ru.

[26] Timothy Keller, *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God* (New York: Dutton, 2011); Jing Hsu, *Marital Therapy for Intercultural Couples* in *Culture and Psychotherapy: A Guide to Clinical Practice* (W.S. Tseng & J. Streltzer (eds.), Washington, DC: American Psychiatric Press Inc., 2001).

that a legally capable remarrying person with a child from a previous marriage shall be aware of the legal consequences and the choices that need to be made in connection with these. In keeping with the Convention on the Rights of the Child, all legal actions concerning children shall be made in the best interests of the child.[27] The UK Children Act serves as the example that prioritizes this issue.[28]

4. Protecting Children's Interests When Establishing with Which Parent, They Will Live

Though the ensuring "the best interests of a child" has become a broadly accepted priority, the meaning of this term still has different legal interpretations.[29]

In Russian family legislation, there exists neither a definition of children's interests, nor the criteria for coordinating their interests with the interests of their parents. For instance, Y. Bespalov, a well-known legal scholar, defines "a child's interest" as "the appropriate conditions for a child's upbringing" and as suitable conditions for a child to exercise its rights, stressing that, in the "interests of a child, the maximum possible capacities of parents to raise and maintain such child shall be ensured."[30]

The author argues that such interests are fundamentally driven by need and suggests that to define the interests of a child as needs ensures the best development and preparation for an independent life in the future.

O. Ilyina suggests the following definition:

> The interests of a child is the subjective (individual) need of a child in having proper living conditions objectively manifested via parental rights and responsibilities stipulated in Family Legislation.[31]

In our opinion, these definitions are too general and not practice oriented.

We hold that the term "interest" requires special interdisciplinary research in order to specify its true legal meaning. Even the etymological analysis of this word shows that it is derived from the Latin word "interest," meaning something critical. It has an additional, subsidiary meaning of being "in between" something or somebody

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[27] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[28] Children Act 1989 (Apr. 20, 2017), available at http://www.legislation.gov.uk/ukpga/1989/41/contents; Children Act 2004 (Apr. 20, 2017), available at http://www.legislation.gov.uk/ukpga/2004/31.

[29] Joseph A. Goldstein et al., *Beyond the Best Interests of the Child* (London: Burnett Books, 1980); Roy Huijsmans, *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations*, 13(2) Children's Geographies 249 (2015).

[30] Беспалов Ю.Ф. Некоторые вопросы реализации семейных прав ребенка (теория и практика) [Yury F. Bespalov, *Some Issues of the Implementation of Family Rights of the Child (Theory and Practice)*] 12 (Vladimir: Vladimir State University, 2001).

[31] Ильина О.Ю. Проблемы интереса в семейном праве Российской Федерации [Olga Yu. Ilyina, *Problems of Interest in Family Law of the Russian Federation*] 21 (Moscow: Gorodets, 2007).

("inter-"). From our point of view, if we were to focus on such meaning, it would lead us not just to specify the needs of the child, but also to relate them to parental capacities (i.e., their ability to maintain a child). Throughout the history of Russian legislation, the term "parental capacities" has been interpreted as follows:

> the law obliges the parents to perform their parental duties only in accordance with their capacities.[32]

Therefore, the interests of a child are evaluated via the perspective of the parents' financial capacities, among others. Nowadays, regarding this question in practice, the court's opinion plays the leading role. The court considers the criteria stipulated in Art. 65(3) of the RF Family Code. These include the emotional attachment of a child to both parents, brothers, and sisters; the child's age; the moral and other qualities of the parents; the existing relationship between the child and each parent; and the possibility for creating the best conditions for the upbringing and development of the child (the parents' occupations, work schedule, material possessions, and marital status). In recent years, the civil rights of children in the family and children's rights and wishes in divorce have become an issue of significant interest.[33] Also, in Australia, when a court is making a parenting order, the Family Law Act 1975 (Sec. 61 DA) requires it to regard the best interests of the child as the most important consideration.[34]

No matter how strange it may seem, parents themselves may serve as the main threat to the interests of a child. When a family is in conflict, a child is often used as an instrument of reciprocal manipulation, first at the stage of selecting his/her place of residence with one of the parents, and then when the question of parental access is decided. Family dispute negotiation via mediation can help overcome unwanted emotional consequences. Also, the advantage of a negotiated decision is that it establishes a balance between the parties in dispute.[35]

The analyzed disputes show that legal enforcement which is provided by court decisions is much less appealing than a goodwill decision to implement mediated agreements. Mediated decisions are preferable because it is not possible to oblige a child to communicate with another parent. We maintain that one of the main

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[32] Законы гражданские с разъяснениями Правительствующего Сената и комментариями русских юристов. Кн. 1 [*Civil Laws with Interpretation by the Governing Senate and Commentaries of Russian Lawyers. The First Book*] 221 (I.M. Tyutryumov (comp.), Moscow: Statute, 2004).

[33] Gerison Lansdown, *Civil Rights of Children in the Family*, 4(2) Child Care in Practice 138 (1997); Tomas Englund et al., *Education as a Human and a Citizenship Right – Parents' Rights, Children's Rights, or…? The Necessity of Historical Contextualization*, 8(2) Journal of Human Rights 133 (2009).

[34] Available at https://www.legislation.gov.au/Details/C2016C01106.

[35] Сюкияйнен Э.Л. Медиация в международных семейных конфликтах: российский аспект, 2 Семейное и жилищное право 27 (2014) [Elga L. Syukiyajnen, *Mediation in International Families Disputes: Russian Law Aspect*, 2 Family and Housing Law 27 (2014)]; Hsu 2001; John G. Oetzel, *Managing Communication Tensions and Challenges during the End-of-Life Journey: Perspectives of Māori Kaumātua and Their Whānau*, 30(4) Health Communication 350 (2015).

reasons for all the above mentioned examples are insufficiencies in legal regulations. For instance, concerning the issues of out-of-court decisions regarding children of separated parents, one should note the following.

First, each parent within the mediation process pursues his/her own interests, while a mediator is a neutral person in charge of the negotiation procedure. It is logical to assume that there is nobody in this process who is in charge of the interests of the child. Second, a court decision shall be in keeping with current legislation, whereas a negotiated agreement does not hold such requirements. The result of a mediated negotiation can be any agreement. As the practice of mediated agreements shows, the parties (parents) may even reach an agreement specifying that one of the parents will not request contact with his/her child in exchange for the other parent not enforcing an alimony payment. However, legal assessment of any kind of agreement concerning a child's interests can only take place if it is mediated in court. In view of the above, we think it is reasonable to adjudicate the status of a mediated agreement known in law enforcement practice as an "agreement of intent." It is necessary to stress that a mediated agreement may serve as an organizational basis for reconciling family members and enabling them to proceed in a way that secures a fixed conclusion. That will also make it possible to resolve legal problems concerning the competition between rules emerging from different branches of legislation. In so doing, it will be possible to resolve confusions concerning mediated agreements, particularly those dealing with common property, which, in contrast to the requirements in the RF Family Code, are concluded via legislation without obligations to use a power of attorney.

5. The Significance of Separation in the Dynamics of Parental Legal Relations

Looking at separation within the context of the general theory of parental legal relations, it is necessary to focus on some important issues. First, parental separation may take place even without termination of family relationships or marriage and may be due to differing circumstances (illness, long-term business trips, etc.). Admissions that parental rights may be subjected to termination as a result are inconsistent with the concept of legal capacity.

To consider a separately living parent as "lesser" just because he/she severed relations with another parent correlates with the situations concerning the rights and obligations of parents who even have never lived together with their children (due to different life circumstances). Such approach undermines the essence of parental legal relations.

To put it in another way, the rights of "illegitimate" children and their parents differ significantly from the rights of children born within legal marriages. However, this fact contravenes Art. 53 of the RF Family Code, as well as the legal basis of family legislation.

Therefore, in keeping with the letter of law, it is logical to conclude that the status of a "separated parent" should not lead to a change in his/her rights. This is also in the rules of the RF Family Code that stipulate the right of a separated parent to contact a child or his/her right to obtain the information about a child does not mean that he/she had not possessed those rights prior to separation. The norm in question implies that parental rights of a separated parent are preserved.

We consider it legally just that the fact of parents' separation shall not affect the essence of parents legal relations.

At the same time, organizational relations between parents are getting more complex, and matters of procedure and conditions for exercising parental duties have come to the fore.

Ideally, they can be resolved by agreement on the exercise of the parental rights of a separated parent. We unanimously agree with the scholars arguing that this kind of agreement cannot be considered transactional, for they do not lead to new rights and responsibilities, neither to the child, nor to one another.[36]

Therefore, it is evident that changes in parental legal status should not be purely connected with the factual separation of parents. The question is, what are the reasons predetermining the change in parental legal status? We can surmise that these reasons may be connected only with the change of the object of parental rights and responsibilities manifested in the change of the mode of parental participation (involvement/contribution) in rearing the child. This fact can only be ascertained by a court of law.

However, at present, there is no provision for a legislative mechanism capable of resolving this matter with the help of the previously mentioned logical sequence of steps. In accordance with the current law, the only grounds for limiting a parent's rights, as provided for in Art. 69 of the RF Family Code involve child abuse or cases in which leaving a child with a parent can cause danger to the child's life or health (Art. 71 of the RF Family Code), thereby changing parental legal relations.

We suggest the following legislative decision: to provide for the legal ability to limit parental rights and obligations in cases in which a parent does not show continued interest in a child's development, avoids his/her parental obligations, or uses his/her parental rights with the intention of taking revenge against the other parent without considering the child's interests in his/her parental responsibilities. We believe that, in such cases, parental rights cannot be preserved. It is necessary to add a provision to Art. 7(2) of the RF Family Code under which careless performance of parental rights by one of the parents shall permit the other to request a limitation of the former parent's rights. Such an approach to solving this issue is consistent with

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[36] Темникова Н.А. Реализация и защита личных неимущественных прав ребенка: Дис. … канд. юрид. наук. [Natalia A. Temnikova, *Execution and Protection of Personal and Non-Property Rights of the Child: PhD thesis*] 103 (Omsk, 2006).

the new trends and demands of modern family law.[37] We strongly believe that, in such cases, it would be reasonable to extend the legal basis for the limitation of parental rights when one of the parents infringes the family rights of the children, even if this infringement does not threaten the children's health or life. Such a stipulation will protect children's rights in cases of parental separation.

Conclusion

The undertaken research makes it possible to propose new legal provisions concerning the protection of family rights of separated parents and their children, stating that the fact of parents living separately shall not terminate or decrease the essence of their parental rights but, rather, that these rights shall be preserved unconditionally within the dynamics of parental legal relations.

The legal status of a parent living separately from a child shall not be changed, including his/her right to participate in the child's upbringing and care. The split of the family relationships as a legal fact should lead only to the change of the organizational mode of parental legal relations which are becoming more complex and require additional regulation via out-of-court negotiations or court orders regarding the procedure for exercising parental rights by separated parents.

Analysis of law enforcement legal precedent shows that the parent living separately usually exercises "reduced" parental rights as compared to the other parent living with the child. From a legal perspective, this can be qualified as an illegal restriction of a separated parent's rights, which infringes both the interests of a parent and of his/her child.

In order to balance the interests of parental legal relations, it is advisable that the court shall be permitted to go beyond the limits of those claims determining the child's place of residence and to make it obligatory for courts to make decisions on equal visitation and access rights for both parents. This proposition could amend Art. 24 of the RF Family Code. Also, we consider it just to stipulate this provision to protect the interests of illegitimate children (children born out of wedlock).

When considering the matter of childcare by a parent living separately, the principal criteria for the court should be the child's requirements for survival and development. While Art. 81 of the RF Family Code suggests that the share of income for alimony payments shall be fixed, we maintain that it should be more flexible, allowing a more malleable allocation should the income of the alimony paying parent increase.

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[37] This idea is in tune with the idea explicit in the Concept of Improving of Family Legislation concerning the amendment "to foresee special a case when parental rights shall not be equal (primarily if the child lives with one of the parents and if the other parent refuses, for no good reason, to care for and to support the child for a period of more than 6 months)." *See* for details the Concept of Improving of Family Legislation of the Russian Federation and Improving of Family Legislation Motions, *supra* note 21.

In connection with the above mentioned suggestion, it will be reasonable to supplement the RF Family Code with a mechanism for dealing with competing rules on using common property of separated parents as well as the rules regulating alimony payments. Alimony obligations, even those that are voluntary, are of a personal character. At the same time, signing an agreement for alimony payment cannot be interpreted as a transaction involving the common property of the parents. This is why it should not require the justification of the power of attorney when parents agree upon personal obligations. We suggest adding this provision to Art. 100 of the RF Family Code.

This research has shown that the need to change parental legal relations with a separately living parent may be caused by a number of factors, among them negligence by a separately living parent and a threat to a child's life and health. Nevertheless, these issues are not stipulated in any article of modern family law, though they may serve as a solid ground for limiting parental rights. We suggest extending the reasons for limiting parental rights for such transgressions and adding them to Art. 71 of the RF Family Code.

Our research has enabled us to draw these conclusions in relation to the protection of the rights of children with separated parents and address the mechanisms according to which it may be possible to modernize current family legislation.

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COMMENTS

GENERAL PRINCIPLES AND CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) – UNIFORMITY UNDER AN INTERPRETATION UMBRELLA?

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Globalization and digitalization of international sales creates needs to harmonize rules of international commercial contracts. The question is whether the harmonization should be done by binding rules or using soft law tools or through digitalization. In this article I argue on favor of harmonization through international contracts law rules' international interpretation.

The international interpretation principles used in this article are found from on Art. 7(1) of the Convention on Contracts for the International Sale of Goods (CISG) which sets three interpretation rules: international character; promoting uniformity; and observance of good faith in international trade. These principles are not only principles of the CISG, but also principles commonly recognized in international commercial practice and also in domestic contract rules. I argue that by adopting an international interpretation umbrella – the meta-principle of international interpretation, cross-border contracts could be interpreted under the same principle no matter applicable substantial law. The meta-principle functions as an interpretation umbrella covering general principles and Articles of the CISG, general principles of international commercial contracts, Lex Mercatoria, and cross-border contract provision under national law.

The outcomes points out that arbitral tribunals have interpreted general principles of the CISG and Lex Mercatoria in various ways. General principles and their application in case law is analyzed in connection with the Civil Code of the Russian Federation. Tribunals found that general principles of the CISG are applicable even if the CISG is not. It follows Art.'s 7(2) logic to promote international standard to cross-border contracts where the closes connection is international commercial practice rather than any national jurisdiction.

Keywords: CISG; Vienna Convention; international commercial contracts; general principles; international interpretation; harmonization; uniform interpretation.

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Introduction

Discussion around the globalization of international sales and need to find a uniform contract law rules is nothing new under the sun. However, there is still lack of uniform rules and legal certainty when domestic courts and arbitral tribunals interpret contract clauses. However, it is necessary to continue the discussion around unification and try to find a way to interpret contract law rules through the nature of the international commercial contracts in global contract chains. In following I argue that this should, and could, be done by adopting an international interpretation umbrella – *the meta-principle of international interpretation*.

Steps towards harmonization in following are not taken by finding common binding contract law provisions but rather to establish universally recognized tools – principles – to interpret contract law rules in more predictable and uniform ways.

In this article I have taken the Civil Code of Russian Federation (hereinafter – Russian Civil Code) as an example of substantial rules interpreted in international commercial arbitration connected to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[1] (hereinafter – CISG or Convention). Drafting of the Russian Civil Code was impacted by the UNIDROIT Principles for International Commercial Contracts (hereinafter – UNIDROIT Principles).[2] Russian Federation is also a contracting State of the CISG. Therefore it is merely easy to justify the use of general principles of the UNIDROIT Principles and the CISG to interpret cross-border contracts in connection with the Russian Civil Code.

Use of general principles as an interpretation umbrella to interpret international commercial contracts in national courts and arbitral tribunals can be justified by following four steps:

1. applicability of the CISG;
2. the CISG as a part of national jurisprudence;
3. parties' intention to act in international commercial practice; and
4. national law rules are codified to national situations and not to national contract relations.

Scope. The scope of this paper is to analyze general principles of international commercial law found in the CISG. My focus will be in Art. 7 of the CISG which sets the

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[1] Full text of the Convention is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

[2] Full text of the UNIDROIT Principles 2010 is available at http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

provisions of the meta-principle of international interpretation. Art. 7(1) sets rules to interpret the Convention itself and Art. 7(2) provides the CISG's gap-filling tools. In this paper my focus will be in Art. 7(2) and its gap-filling methodology. General principles are analyzed through arbitration cases connected to the Russian Civil Code.

The meta-principle of international interpretation is to be established top of the CISG's general principles and be functioning as an interpretation framework, or an umbrella, where general principles, specific provisions and substantial law rules shall be interpreted case by case in light of contracts' international character and purpose.

Methodology. Freedom of contract is widely recognized general principle – also under the CISG. However, my point of view in here is on interpretation rules in situation where parties have not used their freedom to opt-out from the CISG. Therefore I am leaving out the freedom of contract and focusing on situations where a national court or an arbitral tribunal faces the question on whether the CISG or substantial law will be applicable under private international law rules.

Leaving the principle of freedom of contract outside of my scope I am approaching the issue of harmonizing commercial contract law rules by using general principles common to the CISG, the UNIDROIT Principles, national laws and other sources of law in this field. In this sense I am using unification methodology trying to find uniform rules and solutions to questions arising in contracts having connection to different nationalities. In this article I am focusing only one contracting State of the CISG: the Russian Federation. However, same principles can be applied to all other contracting States of the CISG – and, as I argue, also non-contracting States of the CISG.

Idea of harmonizing rules through principles and interpretation and not through codification was found already in Roman law times. Roman law impacted to the common law, *Ius Commune*, in Europe. *Ius Commune* effected to the way different national laws were interpreted across Europe. European lawyers had the same legal education and same methodological sources which harmonized the thoughts and interpretation of European lawyers.[3]

First step in this article is to recognize what are general principles and what kind of general principles there exists under the CISG. Second step is to take closer look on how national law, in this case the Russian Civil Code, and sources of general principles of international commercial contracts are linked together. Does general principles of the CISG apply only when the CISG itself apply? Thirdly I will analyze selected arbitration cases from the Russian Federation on interpretation of Art. 7 of the CISG. Case law shows that interpretation of Art. 7 of the CISG lacks predictability and thus leads opposite conclusions in rather similar issues. Last step is to draw together the case law and general principles and to establish an interpretation umbrella – the meta-principle of international interpretation.

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[3] Pascal Pichonnaz, *Harmonization of European Private Law: What Can Roman Law Teach Us; What Can It Not?* in *Unification and Harmonization of International Commercial Law, Interaction or Deharmonization?* 20 (M.M. Fogt (ed.), Alphen aan den Rijn: Kluwer Law International, 2012).

Outcomes. Outcomes of this article suggests that arbitral tribunals are interpreting international commercial contracts through international interpretation principle. However, the case law provides opposite judgements to similar cases and thus the big picture stays unpredictable and unclear. General principles are abstract and judges rather use specific rules than abstract principles. Analyzed cases presents interpretation of Art. 7(2) of the CISG in way where tribunals have been seeking other sources than just picking up the easiest way to go to national law.

General principles of the CISG and of international commercial contracts in general offers framework where to find tools for international interpretation. The toolbox is available but yet we need to figure out how to use those tools in a way that parties can benefit from better legal certainty and more predictable judgments.

1. Definition of General Principles

Magnus[4] writes that principles are basic rules where general principles are very basic rules.[5] General principles are more broad and abstract than principles generally. In their abstract nature general principles are something opposite to specific codified articles. Therefore general principles are not direct solution to a concrete legal issue.[6] To apply a general principle, abstract in its nature, to a specific legal issue the principle needs to become more concrete and specific rule.[7]

I refer to general principles following Magnus' definition of broad and abstract basic rules found from the provisions of the CISG. Following from the case law[8] there are several general principles in the CISG. Those relevant to the case law analyzed in this article are general principles of party autonomy, good faith, right to interest, and favor contractus.

The CISG creates its own specific reference to general principles in Art. 7(2).[9] The UNIDROIT Principles refers to general principles in similar way.[10] Arbitral tribunals

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4 Ulrich Magnus, *Harmonization and Unification of Law by the Means of General Principles* in *Unification and Harmonization of International Commercial Law, Interaction or Deharmonization?* 162 (M.M. Fogt (ed.), Alphen aan den Rijn: Kluwer Law International, 2012).

5 Axel Metzger, *Allgemeine Rechtsgrundsätze* in *Handwörterbuch des Europäischen Privatrechts I* 33 (J. Basedow et al. (eds.), Tübingen: Mohr Siebeck, 2009).

6 Magnus 2012, at 162.

7 *Id.*

8 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 Edition) (Apr. 25, 2017), available at http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf.

9 Camilla Baasch Andersen, *General Principles of the CISG Generally Impenetrable?* in *Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* 13 (C.B. Andersen & U.G. Schroeter (eds.), London: Wildy, Simmonds & Hill, 2008).

10 Magnus 2012, at 165.

keep referring to the UNIDROIT Principles as general principles of international contracts.[11]

Magnus argues that there are common guidance objective when concrete rules are not available. General principles can also be used to secure the right obligation of law in situations where strict application of specific rule would lead into injustice result.[12]

However, general principles in the CISG and the UNIDROIT Principles functions in different way. The general principles are guidelines for interpreting their provisions and in this character even to substitute the other way applicable national law[13]. Magnus claims that in situation general principles in international conventions expresses clearly their goals in the convention principles should be followed.[14]

Andersen asks that how uniform should the CISG's uniform interpretation be? Should uniformity vary from provision to another? There has to be at least some level of uniformity in every provision to promote the uniformity of the CISG entirely.[15] However, even that Art. 7(1) provides uniform application it does not lead into a duty of judges' uniform interpretation.[16]

1.1. Article 7 of the CISG

Chapter II, Arts. 7 to 13, of the CISG sets provisions to general issues under the Convention. Art. 7, which will be the focus of this article, provides interpretation rules. Art. 7(1) sets rules to interpret the Convention itself and Art. 7(2) the CISG's gap-filling provisions. In this paper the focus will be in Art. 7(2) and its gap-filling methodology.

> Article 7
>
> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

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11 Magnus 2012, at 166.

12 *Id.*

13 *Id.* at 167.

14 *Id.* at 169.

15 Camilla Baasch Andersen, *Uniformity and Harmonization by Case Law: The CISG and the Global Jurisconsultorium* in *Unification and Harmonization of International Commercial Law, Interaction or Deharmonization?* 180 (M.M. Fogt (ed.), Alphen aan den Rijn: Kluwer Law International, 2012).

16 *Id.* at 182.

Art. 7(1) determines rules for interpretation and filling gaps of the CISG. The paragraph sets out three interpretation principles:

1. international character of the CISG;
2. aim to promote uniformity in its scope; and
3. good faith in international trade.

Art. 7(2) provides gap-filling methodology for issues which are covered by the CISG but not expressly settled in its provisions. This means that if the issue falls under the scope of the CISG, and is not dealing with the validity of the contract and thus fall under Art. 4, it is covered under the CISG and thus interpretation rules of Art. 7(2) apply. Problematic within this principle is, whether the issue is covered by the CISG or not.[17]

Art. 7(2) includes two different principles to fill gaps:

1. general principles of the CISG; and
2. domestic law.

If there is no explicit statement in the provisions to settle the issue, the interpreter must first apply the general principles of the CISG. Only in a case where there is no general principle applicable to that specific issue, can domestic law be applied.

1.2. General Principles of the CISG

In the UNCITRAL Digest of Case Law[18] there are several general principles courts have found from the Convention. These general principles are as follows: party autonomy; good faith; estoppel; place of payment of monetary obligations; currency of payment; burden of proof; full compensation; informality; dispatch of communications; mitigation of damages; binding usages; sett-off; right to withhold performance and the principle of simultaneous exchange of performances; right to interest; costs of one's own obligations; changed circumstances and right to renegotiate; and favor contractus.

2. The Principle of International Interpretation

Art. 7 of the CISG provides two principles to fill gaps in contracts governed by the CISG. Principle to fill gaps in the CISG itself is to apply general principles of CISG. Second principle is for gaps falling outside of the CISG's scope which shall fall under applicable national law. These gap-filling principles shall be used, according to Art. 7, in the above mentioned order. First to apply general principles, and only if the general principles are not available, then applicable national law.

Art. 7(1) of the CISG sets the international character as starting point to interpret the CISG. However, it is everything else than clear how such interpretation standard actually should be used in practice. Therefore the international standard should be

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17 Rolf Herber et al., *Chapter II: General Provisions* in *Commentary on the UN Convention on the International Sale of Goods (CISG)* 61 (P. Schlechtriem (ed.), Oxford: Clarendon Press, 1998).

18 UNCITRAL Digest of Case Law, *supra* note 8.

defined as an interpretation tool. My aim is to define the standard as the international interpretation principle. Where the standard is the starting point of the CISG's interpretation, the international interpretation principle shall function as a meta-principle providing framework where general principles and specific provisions are interpreted in. The framework, or an umbrella, thus promotes uniform interpretation platform to respect contracts' cross-border nature whatever substantial rules apply.

Grounds for the international interpretation and the CISG has been taken around the issue of penalty clauses and thus I am here referring shortly on interpretation options discussed an academia on penalty clause debate. According academics' question of penalty clauses falling under the CISG, or not, there have been three options how penalty clauses could be treated under the CISG. Graves divides these three options as follows:

1. validity of penalty clauses is falling under applicable domestic law;
2. the CISG is directly applicable to penalty clauses; and
3. penalty clauses are not directly falling under the CISG but shall be interpreted in light of the uniform approach of the CISG.[19]

First interpretation option is to interpret penalty clauses falling under Art. 4 of the CISG and apply national law.[20] Second option is the CISG's direct application. Zeller argues that the issue of penalty clauses should not be tried to solve focusing on single Articles of the CISG but to approach the issue viewing the CISG as a whole. As the general principles apply to the CISG as a whole, Zeller argues that it is not possible to exclude penalty clauses based on the lack of explicit provision if they can be seen falling under the scope of the general principles.[21]

Hachem argues that applicable domestic law shall be interpreted *by applying an international standard*[22] that would follow the principle of uniformity under Art. 7 of the CISG. The CISG Advisory Council gave its opinion regarding the issue of penalty clauses under the CISG and provided options on international interpretation and definition of international standard. The one rule of the opinion states that even the issue of penalty clauses shall fall out of the CISG should domestic law rules been interpreted through an international standard.[23]

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19 Jack Graves, *Penalty Clauses and the CISG*, 30 Journal of Law and Commerce 153 (2012); Touro Law Center Legal Studies Research Paper No. 14-41 (2012), at 5 (Apr. 25, 2017), also available at http://ssrn.com/abstract=2350315.

20 Bruno Zeller, *Penalty Clauses: Are They Governed by the CISG?*, 23(1) Pace University School of Law International Law Review Online Companion 8 (2011) (Apr. 25, 2017), also available at http://digitalcommons.pace.edu/pilr/vol23/iss1/1.

21 *Id.* at 5.

22 Graves 2012, at 5; CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rappourter: Dr. Pascal Hachem, Bär & Karrer AG, Zürich, Switzerland, adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on August 3, 2012 (Apr. 25, 2017), available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op10.html.

23 CISG-AC Opinion No. 10, *supra* note 22.

According to the CISG Advisory Committee the international standard shall be the one found from the provisions of the CISG. In other words it means reference to the general principles of the CISG which does not limit parties' freedom to agree fixed sums in general in regard to issue of penalty clauses. A validity test of the penalty clause following the international interpretation should therefore be taken under the international standards presented by the CISG. Interpreting domestic law in this view is possible as the CISG has become a part of a domestic jurisdiction when adopted. The CISG is applicable only to international sale contracts and thus it is reasonable to interpret international contracts differently than pure domestic contracts.[24]

3. The UNIDROIT Principles

The UNIDROIT Principles 1994 have been serving arbitral tribunals and national courts as a source of gap filling when international conventions or national laws are not providing an answer. However, the UNIDROIT Principles have also been used as a model law for national legislations – one of such national laws being the Russian Civil Code.[25]

The Russian Civil Code has taken impact from the UNIDROIT Principles and therefore it offers a good sample of national law where general principles of international commercial contracts have become part of national law and national contracts. The direct transform of the UNIDROIT Principles to the Russian Civil Code is not necessarily possible to indicate but the impact as a model law behind the Russian Civil Code is not disputed.[26]

4. International Interpretation and National Law

4.1. International Character of Russian Civil Law

> Art. 7, para. 1 of the Russian Civil Code: [G]enerally recognized principles and norms of international law and international treaties of the Russian Federation shall, in accordance with the Constitution of the Russian Federation, be an integral part of the legal system of the Russian Federation.

However, scholars have criticized that the above paragraph does not provide grounds for direct application of international principles as a part of national law.[27]

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[24] CISG-AC Opinion No. 10, *supra* note 22, para. 4.2.1.

[25] Thomas Probst, *The UNIDROIT Principles of International Commercial Contracts 1994 and 2004: A Brief Introduction with a Synoptic Overview* in *The UNIDROIT Principles 2004 – Their Impact on Contractual Practice, Jurisprudence and Codification (ISDC Colloquium – 8/9 June 2006)* 18 (E.C. Ritaine & E. Lein (eds.), Zürich: Schulthess, 2007).

[26] Josef Skala, *The UNIDROIT Principles of International Commercial Contracts: A Russian Perspective* in *The UNIDROIT Principles 2004 – Their Impact on Contractual Practice, Jurisprudence and Codification (ISDC Colloquium – 8/9 June 2006)* 120 (E.C. Ritaine & E. Lein (eds.), Zürich: Schulthess, 2007).

[27] *Id.* at 124.

Thus, even that direct transformation from international principle into a provision of national law would not be possible under Art. 7 of the Russian Civil Code it is however offering a possible way to find a solution from international principles when precise rule is not available.[28]

> The Plenum of the Supreme Court of Russian Federation, in its Decree No. 5 of 10 October 2003, has instructed courts of general jurisdiction that such "generally recognized principles" are the "basic imperative norms of international law adopted and recognized by the international community of States as a whole, deviation from which is inadmissible" (point 1). Examples given by the Plenum include universal respect for human rights and good-faith fulfilment of international obligations… Russian doctrinal writings in many instances equate such "generally-recognized principles" to customary international law.[29]

Russian civil law recognizes international sources of law as a part of its legal system. International legal principles found as general principles are seen as a part of the national jurisdiction. The status of such legal principles is stated in Art. 15, part 4 of the Constitution of the Russian Federation. If there is collision between national and international principle the international principle shall prevail.[30]

Russia is a contracting State of the CISG which leads to a situation where general principles of the CISG are part of a national legal system and shall be interpreted in their own character and not through national law.

UNIDROIT Principles are not recognized under Art. 7 of the Russian Civil Code as conventions like the CISG are. However, UNIDROIT Principles are recognized and can be taken into account as part of commercial practice.[31]

One special character of the Russian Civil Code is that contracts where other party is Russian citizen, no matter which law is applicable, shall always be in written form. This rule has been taken also in the CISG.[32]

In the Russian Civil Code a customary commercial practice is recognized and it can be used to identify specific character of the practice concerning the contract relationship. However, the commercial practice cannot be against legal rules, so far only good faith commercial practice can be recognized as a source to interpret contracts. Commercial practice is a fast source if nothing else is found to give an answer to the issue.[33]

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28 Alexander S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: A Russian View*, 1(2) Uniform Law Review 252 (1996).

29 William E. Butler, *Russian Law and Legal Institutions* 135 (London: Wildy, Simmonds & Hill, 2014).

30 Vladimir Orlov, *Venäjän sopimusoikeus* 55 (Helsinki: Lakimiesliiton Kustannus, 2001).

31 *Id.* at 56–57.

32 *Id.* at 59.

33 *Id.* at 60.

In Russia the UNIDROIT principles are used by the parties' choice of law of their contract and even if not chosen by the parties the Principles are used to resolve issues arising out of international contractual relationships[34].

4.2. Case Law and Customs as a Source of Law in Russia

In this context the case law refers to an international commercial arbitration cases. The UNCITRAL Model Law on International Commercial Arbitration (1985) has been the basis for the Russian Law on International Commercial Arbitration (1993). The Model Law states that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."[35]

The Russian Civil Code recognizes the commercial practice in Art. 5, para. 1 as a source of law. Commercial practice can be used always when the question is arising from relationship of two or more enterprises as it is recognized as a common practice. According to Art. 5 of the Russian Civil Code customs refers to behavioral rules applied in international commerce or rules referred in some document but are not provided by legislation. Therefore customs are mainly rules under law of obligations.[36] Internet and databases brings judicial decisions accessible on public. This has strength the meaning of case law and its precedential value of gap filling.[37] However, published arbitration awards are not been seen as a precedent. Therefore an arbitration award does not have significant meaning for the Russian legal system.[38] But approaching the Russian legal system in international context they might have more value and they might have influence in international context.

5. General Principles in the CISG Case Law

In this chapter general principles for the foundations of the meta-principle of international interpretation are found from the CISG and analyzed through arbitration cases connected to the Russian Civil Code. Arbitrators in the cases analyzed in this chapter have interpreted Art. 7 of the CISG in light of either solving the case by using general principles or finding the issue falling outside the scope of the CISG and applied substantial law. Analyzed cases are arbitration cases taking place in the

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34 Skala 2007, at 128.

35 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (Apr. 25, 2017), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

36 Butler 2014, at 128–129.

37 *Id.* at 124.

38 V.V. Veeder, *1922: The Birth of the ICC Arbitration Clause and the Demise of the Anglo-Soviet Urquhart Concession* in *Global Reflections on International Law; Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 881–901 (G. Aksen & R.G. Briner (eds.), Paris: ICC Publishing, 2005).

Russian Federation and English translations of the cases are available at UNCITRAL's CLOUT,[39] CISG Database[40] and UNILEX[41] databases.

5.1. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, June 5, 1997, No. 229/1996

The contract included a penalty payment term in case of a delay of the payment. Party obliged to pay the penalty according to the contract challenged the clause based on the agreed sum was unfair. The CISG was applicable to the dispute but it does not cover the question of validity of a penalty clause. Therefore the arbitral tribunal applied other rules for the issue. The arbitral tribunal decided to apply the UNIDROIT Principles to fill the gap of the CISG instead of applying domestic law.[42]

The Court found that the application of the UNIDROIT Principles is possible according the Preamble stating that *they may be used to interpret and supplement international uniform law instruments*. Second reason to apply the Principles was that they are based on common practices of international commerce which the Court though the parties knew or *ought to have known*. As reflecting the usages of international trade the Court held that the Principles can be applied under Art. 9(2) of the CISG. As a result the Court found that the penalty fee was excessive under Art. 7.4.13(2) of the UNIDROIT Principles.[43]

Common interpretation of the CISG is that penalty clauses are not explicitly covered and thus penalty clauses falls under Art. 4 of the CISG which determines questions of a validity falling under the applicable domestic law. However, this interpretation has been lately challenged. It is argued that Art. 74 of the CISG would actually cover fixed sums and therefore Art. 4 of the CISG would not be applicable. Thus penalty clauses would be directly covered under CISG.[44]

The Court followed the common interpretation that penalty clauses are falling outside of the scope of the Convention. The Court found question of validity of penalty clauses falling outside of the CISG but instead of applying substantial law the Court decided to apply the other source of general principles of international commercial contracts. Therefore I could argue that the Court actually applied the principle of

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39 The UNCITRAL Secretariat's database of information on court decisions and arbitral awards relating to the CISG (Apr. 25, 2017), available at http://www.uncitral.org/uncitral/en/case_law.html.

40 CISG Database of Pace Law and Institute of International Commercial Law (IICL). CISG Database is to promote cross-border trade and the rule of law and it includes the CISG case law, Treaty text and legislative history and guidelines to apply the CISG (Apr. 25, 2017), available at http://iicl.law.pace.edu/cisg/cisg.

41 Database of international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the CISG (Apr. 25, 2017), available at http://www.unilex.info.

42 English translation available at http://cisgw3.law.pace.edu/cases/970605r1.html.

43 Skala 2007, at 129.

44 Graves 2012, at 3–6.

Art. 7(2) of the CISG that issues *not expressly settled in it are to be settled in conformity with general principles on which it is based* instead of finding the applicable general principle from the CISG the Court applied general principles of the UNIDROIT Principles.

5.2. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, April 27, 2005, No. 5/2004

The Court held that the principle of good faith and fair dealing is a fundamental principle of mandatory nature in international commercial relations, as determined in Art. 1.7 of the UNIDROIT Principles. In the fundamental and mandatory nature the principle was extended to cover the parties' contractual relations not only for the contract but also to the preliminary state of concluding the contract and also for the contractual relations at the stage where conflict took place. The Court held that the fundamental character of the principle covers the whole pre-arbitral stage and not only the contract itself.[45]

However, as the conflict between parties was from the validity of a penalty clause, the Court held that the CISG is not applicable. Thus the Court found that the clause shall be interpreted under a substantial law of the contract. The question of a penalty clause was to be decided under the substantial law, which in this case was the Russian Federation law and Art. 333 of the Russian Civil Code.

5.3. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, December 19, 2008, No. 14/2008

The Court found that the CISG was applicable to the dispute. Issues not covered under the CISG falls under Art. 1211 of the Russian Civil Code determining the applicable law of the country of the seller. The Court stated that the question of penalty clause did not fall under the application of the CISG and therefore applied Croatian law. Preliminary work of the CISG rejects penalty clauses to fall under Art. 7(2). However, analogy for similar issues which are not rejected by the preliminary work for falling under the CISG could be made. Issues not expressly settled in but falling under the general principles shall lead to application of the CISG.[46]

5.4. International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, February 8, 2008

The parties agreed the Court's proposal to apply the general standards and rules of international contracts as a governing law of the contract. Therefore *Lex Mercatoria* to cover the contract and thus the CISG was not directly applicable. However, the CISG and the UNIDROIT Principles apply indirectly via principles and practices expressing international commercial customs. The Court also held that the general

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[45] English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at http://www.unilex.info/case.cfm?id=1201.

[46] English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at http://www.unilex.info/case.cfm?id=1493.

principles can be found from various rules of domestic law applicable generally to international contracts under parties' choice of law.[47]

Even that the CISG was not applicable as a governing law of the contract it was applicable through its general principles as part of *Lex Mercatoria*. I argue that following this path the international interpretation principle shall be similarly applicable to all international commercial contracts even if the CISG itself would not directly apply.

5.5. Court of Arbitration of the International Chamber of Commerce, February 1999, No. 9474

The Court of Arbitration of the ICC proposed that the general standards and rules of international contracts shall apply in this case. The Court stated that the CISG is generally agreed to address universal principles on international contracts even if the contract is not covered by the CISG itself. Parties had not choose the CISG as the governing law of the contract the CISG can be used as a source of standards and rules of international contracts. Other references for such standards and rules were found from the Principles of European Contract Law and the UNIDROIT Principles. The Court underlined that the standards and rules found from above mentioned sources apply through the intention of the parties. The general standards and rules of international contracts are not, however, only found from international conventions but also from different national laws chosen by parties for such circumstances. The Court stated that the CISG does not directly apply to the issue and thus the issue shall be under an assessment of a broad perspective of international contracts. The principle applicable in the case, vendor cannot rely on a buyer's failure to inspect the goods and to give timely notice of defects, is recognized in international contracts and found in Art. 40 of the CISG.[48]

5.6. Federal Arbitration Court of the Volga-Vyatka Area, April 2, 2007, No. A43-21560/2004-27-724

In this case the Court of Appeal held that the lower court had apply incorrectly the national law on issue what was actually – following the Court of Appeal – governed under the CISG. The responded claimed that the CISG should apply through national law. The CISG was found applicable on the interest on the agreed sum party fails to pay. The Court held that there was no question of damages or penalty and thus the CISG apply and national law principle reducing the payable sum shall not be applied. Thus it was in question on how the CISG defines interest which is not a penalty or constitutes damages. As the CISG covers the question of interest there was no need for cap filling by national law under Art. 7(2) of the CISG.[49]

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[47] English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at http://www.unilex.info/case.cfm?id=1497.

[48] English translation of the decision is found from the UNILEX database (Apr. 25, 2017), available at http://www.unilex.info/case.cfm?id=716.

[49] English summary of the case is found in the CLOUT database, CLOUT case 1111 (Apr. 25, 2017), available at http://www.uncitral.org/clout/clout/data/rus/clout_case_1111_leg-2882.html.

5.7. Tenth Arbitration Appeal Court, Moscow, April 14, 2012, No. A41-20318/11

The question was on Art. 7(2) of the CISG and issues falling outside of the CISG's scope. The Court held that the CISG does not specify the amount of interest payable if the buyer does not pay the agreed price. The CISG was not applicable under Art. 7(2) as the Convention's possibility of recovering interest was not clear enough to specify the interest under the CISG. Substantive law shall apply. The CISG stays silent also on the method how the interest shall be calculated. Therefore the Court held that national law shall apply on the question how to determine the interest.[50]

5.8. Outcomes of the Case Law

The three cases dealing with the issue of penalty clauses all held that the CISG does not apply to penalty clauses. However, the one tribunal found that in a nature of the contract the issue shall be solved under the common practices of international sale and applied the UNIDROIT Principles instead of national law. This follows the idea of international interpretation where the issue is from cross-border contract and thus the solution should follow the same cross-border character. One penalty clause case express the analogical interpretation of similar issues. Therefore if issue of penalty clauses would not be expressly left outside of the CISG they should be falling under Art. 7(2) and general principles of the CISG.

In the cases on the issue if the CISG covers an interest or not and are such provisions clear enough. In one case the tribunal found the CISG applicable but in another the tribunal stated that even interests falls under the CISG the provision is not clear enough to specify interest under the CISG. I argue that here the tribunal made an error and applied national law instead of the CISG. When the CISG was applicable the first gap-filling principle of Art. 7(2) states that if the issue is *not expressly settled in* it shall be *settled in conformity with the general principles*. The second gap-filling principle of Art. 7(2) states that *in the absence of such principles* the issue shall be settled *in conformity with the law applicable*. The reason the CISG was not found applicable was lack of specific provisions to calculate the payable sum. I argue that even that there were not specific provisions to calculate the exact sum the general principles apply. And according to Art. 7(2) if there are applicable general principles the CISG shall apply over the substantial law.

There were two cases where the CISG's general principles were found applicable even the CISG itself was not. General principles apply as part of *Lex Mercatoria* and thus international interpretation principle of the CISG can be applied in similar way.

Conclusion

General principles are abstract and broad rules and they are not giving direct solution to specific legal issue but they can be used as a guidance to find a correct

[50] English summary of the case is found in the CLOUT database, CLOUT case 1364 (Apr. 25, 2017), available at http://www.uncitral.org/clout/clout/data/rus/clout_case_1364_leg-3130.html.

case by case interpretation for concrete applicable norm.[51] Therefore it is not easy way opt interpretation from general principles, but at the other hand, therefore it is reasonable to adopt general principles as interpretation framework.

Following the discussion of penalty clauses and the CISG there has been arguments favoring the CISG's interpretation through international standard provided in Art. 7(1) of the CISG. As the provision of international standard leaves its definition open and unclear I argue that the standard should apply as a meta-principle of international interpretation. The meta-principle works as an interpretation umbrella to cover general principles and Articles of the CISG, general principles of international commercial contracts, *Lex Mercatoria*, and cross-border contract provision under national law.

Arbitral tribunals have interpreted general principles of the CISG and *Lex Mercatoria* in disputes in various ways. In this article I analyzed three cases on penalty clause issue. In all cases tribunals found that penalty clauses falls outside of the CISG. However, one tribunal applied the idea of international interpretation stating that the issue shall be covered by common practices of international sale and thus the UNIDROIT Principles were found applicable. The tribunal found that even there was no provision for penalty clauses the issue was not automatically falling under the domestic law. Tribunal's ruling followed Art. 7(2) of the CISG which states that only if there are no general principles applicable at all national law shall apply.

Tribunals also found that general principles of the CISG are applicable even if the CISG is not. It follows Art. 7(2) logic to promote international standard to cross-border contracts where the closes connection is international commercial practice rather than any national jurisdiction.

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[51] Magnus 2012, at 162.

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CONFERENCE REVIEW NOTES

KAZAN ARBITRATION DAY: THE RULE-OF-LAW DEVELOPMENT AND REGIONAL GOVERNANCE

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The third Annual Symposium of the Journal «Herald of Civil Procedure» «2016 – Kazan Arbitration Day: The Rule-of-Law Development and Regional Governance» was hosted by the Law Faculty on September 30, 2016.

The opening ceremony of the event took place in the Hall of the Board of Trustees of the Kazan University, followed by an academic discussion on legal issues of the Symposium. The Symposium participants and invited guests had the opportunity to discuss the most current and topical issues of civil procedural law, to present the latest Russian and foreign academic works in this direction to colleagues, to offer further ways of development of contemporary civil procedure, and to exchange experience and accumulated knowledge.

The Symposium discussed both the issues that directly related to arbitration proceedings as well as the most relevant news in the field of civil procedure and enforcement proceedings in general.

1. Unification of Civil Procedure and Enforcement Proceedings on International and Domestic Levels

The Symposium was opened by the report of *Professor Vladimir Yarkov (Urals State Law University, Russia)*, on the topic "The Global Code of Enforcement in the System of Harmonization of Enforcement." The Global Code of Enforcement was developed within the framework of the International Union of Bailiffs. This document has been in the focus of attention of the International Union for a long time. The idea was suggested in the framework of the Union and its first presentation was made at a congress in Washington in 2006, where the notion of harmonization of executive proceedings in the field of justice without borders was put forward. The idea of this code is creating a common world standard of enforcement proceedings, which would be equally applicable to both states with common law and continental law, as well as to states with an extrabudgetary enforcement system, and those with state funding. The Code is general in nature, it includes many provisions which are not entirely attributable to Russia. Professor Yarkov highlighted the following most significant provisions:

– consideration of the right to performance as a fundamental right in the Code;

– the possibility of introducing the obligations of the debtor to declare his property into national law;

– inability of using professional secrecy as grounds for refusal to provide information;

– the need of using new technologies for the transparency of enforcement proceedings;

– the need for taking on the role of mediator and conciliator for bailiffs in the stage of enforcement proceedings.

The speech of *Professor Alexander Bonner (Kutafin Moscow State Law University (MSAL), Russia)* was devoted to the liquidation of the Supreme Arbitration Court of the Russian Federation and the creation of a unified Civil Procedure Code of the Russian Federation. In his report, Alexander Bonner noted that the idea of a unified procedural code is not new. Once it was proposed as the idea of "judicial law," which implied the unification not only of civil procedure, but criminal and administrative procedures as well. Alexander Bonner expressed his negative attitude towards the idea of unification of codes and explained that a part of the Civil Code rules applies to all subjects of civil relations: both citizens and legal entities, while another part of the norms of this Code, as well as the norms of the Family Code in Russia, applies only to citizens, and another part only to legal entities. Also, the judicial process is frequently based on different kinds of evidence. In the courts of general jurisdiction, testimonies are the primary form of evidence, while in arbitration courts, written evidence has the highest significance.

2. Arbitration

As for reports about arbitration proceedings, there should be noted the speech of *Gleb Sevastyanov (Saint Petersburg State University, Russia)* on the topic "Modern Reform of the Arbitration Trial: Statement of the Problem and Some Results." According to Gleb Sevastyanov, it is necessary to observe the following three basic conditions for effective arbitration:

– the guarantee of its availability. As Sevastyanov pointed out, we keep talking about access to justice *per se* but do not really think about the availability of alternative dispute resolutions, in particular, the institute of arbitration. He drew attention to the question of how many arbitration courts there should be in Russia. It is estimated that there are 2–3 thousand courts across Russia – which is quite a significant number. There is no country in the world with the same quantity. But given the size of the country, if the number of state courts is 2–3 thousand, why should we lower the number of arbitration courts if they should be the most available to the parties?

– development and improvement of legislation which should correspond to the legal nature of arbitration and to international standards, while taking national peculiarities into account;

– formation of an arbitration-oriented approach in the practice of state courts. Whatever solution the legislator makes, no matter how many courts are created, it all depends on the interaction of arbitration and state courts, and their mutual understanding. Perhaps it is good that the law currently allows retired judges to be arbiters – because it is another bridge for understanding.

Professor Elena Nosyreva (Voronezh State University, Russia) made a presentation entitled "The Impact of the Russian Arbitration Reform on Procedural Legislation." She noted that the necessity of harmonization of legislation on arbitration procedure is the first thing we should talk about. In 2002, when the Civil Procedure Code, the Arbitration Procedure Code and the Law on Arbitration Courts of the Russian Federation were accepted and developed (almost simultaneously), such coherence was achieved almost completely, but today we cannot talk about complete harmonization. The norms of the new Law on Arbitration have not been fully reflected in contemporary norms of procedural codes. For example, the terminology is not completely the same. For example – certainly, the most basic term is "arbitration agreement." The Law on Arbitration uses this term ("arbitrazhnoe soglashenie"), but procedural codes still use such terms as "treteyskoe soglashenie"[1] or "soglashenie o treteyskom razbiratelstve" ("agreement on arbitration procedure"), but there is no term "arbitration agreement" as applied in arbitration procedure under the Law on Arbitration.

[1] The term "arbitration" is used in two meanings in Russian language: 1 – system of arbitration courts (those courts who deal with commercial cases); 2 – arbitration ("treteyskoe sudoproizvodstvo"), same meaning as "arbitration" in English, when a case is administrated by an arbitrator.

Professor Askhat Kuzbagarov (North-Western branch of the Russian Academy of Justice, Saint Petersburg, Russia), made a report on the topic "On the Content of International Reputation: The Issue of the Right to the Exercise of the Functions of the Permanent Arbitration Institutions in the Russian Federation." He raised questions such as: what are the opportunities for the resolution of disputes in the courts of integration associations? Which courts are used to resolve economic disputes? What is an independent international arbitration needed for? What is the basis for the enforcement of the decisions of international commercial arbitrations? It was noted that, nowadays, legislation does not provide clear answers to these questions.

Mikhail Schwartz (Saint Petersburg State University, Russia) presented a report on the topic "Arbitration in Russia: Issues of Systematization," and told about the first meeting of the Council for the Improvement of Arbitration:

– he noted that institutions of including arbitration courts into the activities of the Council for the Improvement of Arbitration through licensing arrangements still bring up many questions;

– there is a need to restore the trust of citizens and organizations towards arbitration;

– the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry is already working on regulations, and of course, as a pioneer, tests these mechanisms. However, it does not see the need to adopt a separate regulation for corporate disputes, thus trying to avoid duplication of the rules and, therefore, the regulation of corporate disputes may appear only as a section of the main (general) regulations (but not as a separate regulation). The topic of feasibility of involvement of specialists in the sphere of criminal law as arbitrators was also discussed.

3. Foreign Experience

Marybeth Sorady (Washington, USA) was the first of foreign speakers and talked about the conceptual framework for measuring the application of rule of law.

According to Sorady, the World Justice Project began in 2006 as an initiative of the American Bar Association to develop methodologies to measure compliance with global environmental initiatives. It is now an independent non-profit, multidisciplinary organization that has developed a methodology for measuring compliance with all facets of the rule of law in more than 100 countries. It has formulated four universal principles of the rule of law, based on international standards nine factors characterizing the rule of law, multiple sub-factors to evaluate in measuring compliance with each factor, as well as measurement methodologies that are applied in a yearly survey of more than 100 countries.

The four universal principles of rule of law are as follows:

– the government and its officials and agents as well as individuals and private entities are accountable under the law;

– the laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property;

– the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;

– justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The nine factors characterizing rule of law are defined as: constraints on government power, absence of corruption, open government, fundamental rights, order and security, regulatory environment, civil justice, criminal justice and informal justice.

The project also formulated 44 sub-factors ranked 1 through 8 from two data sources in each country: a general population poll conducted by leading local polling companies using a representative sample of 1,000 respondents in the three largest cities of each country, and qualified respondents' questionnaires consisting of closed-ended questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labor law, and public health.

102 country profiles and description of process (available at http://data.worldjusticeproject.org) were also shaped. Each profile displays:

– the country's overall rule of law score and ranking;

– the score of each of the eight dimensions of the rule of law as well as the global, regional, and income group rankings;

– the score of each of the 44 sub-factors together with the average score of the country's region and the country's income group.

The representative of the delegation of China, *Liu Kexi*, Director of the Institute of Legislative Development in the Institute for Chinese Legal Modernization Studies, Vice-President and chairman of the Academic Committee of the Law Society of Jiangsu Province, had a report entitled "Improvement of the Relations between Arbitration and Litigation in China." By the end of 2015, there are 244 Arbitration Commissions in China. In 2015, the Arbitration Commissions reviewed 136,924 cases in total, which is 1.36% of the total number of civil cases reviewed by courts in the first instance, and 0.007% of all the cases adjudicated by the courts during the same period. In the period from 2012 to 2014, the proportion of the cases considered by the arbitration commissions to the civil cases accepted by the courts in the first instance is the same as the percentage listed above. A few years before 2012, the amount of arbitration cases was even less than 1% of civil cases accepted by the courts in the first instance. For resolving disputes, the arbitration system has the following unique advantage: the autonomy of the will of the parties, flexibility, confidentiality and low cost; however, the indicated number above shows that the Chinese arbitration system is far from perfection. The reason is believed to be the lack of elaboration of the law regulating the relationship between the Chinese arbitration and litigation.

Firstly, the Chinese arbitration should not absolutely follow the judicial interpretation. Secondly, when intermediate courts with jurisdiction make adjudications on permission of the enforcement of the decision of the arbitral tribunal, courts should not start the procedure for the revocation of the arbitral award. Thirdly, except for the courts of the middle level with jurisdiction, the higher courts and the Supreme Court should not have the direct power to make decisions on revocation, non-enforcement or temporary respite of arbitration award. Fourthly, if the parties agreed to apply arbitration clauses and indicated 2 or more arbitration commissions, they have the right to address one of the arbitration institutions in the clauses. Fifthly, when the courts of the middle level with jurisdiction make decision to cancel or refuse the enforcement of the arbitration award given by the Chinese arbitration institutions, they should also report to the higher courts and the Supreme Court, just like cancelling or refusing to enforce the arbitration decision made by foreign arbitration institutions. Finally, the arbitration institutions should enhance their own construction and improve the interaction with the judiciary.

Nikola Bodiroga (University of Belgrade, Serbia) was another guest of the Symposium, and he presented a report on the topic "Rule of Law and Enforcement in Serbia." Serbia is in the process of negotiations on joining the European Union and has decided to reform its civil procedure. Decisions in civil cases are the last phase of the right to judicial protection, but since 2004 the Convention for the Protection of Human Rights and Fundamental Freedoms came into effect. The first decision of the European Court of Human Rights against Serbia was related to enforcement. For many years the enforcement procedure has been one of the weakest parts of Serbian judicial system. Enforcement of civil judgments and other enforcement and authentic documents has been organized in a way that prevented enforcement creditors to collect their claims. As a consequence of that, numerous judgments have been rendered against the Republic of Serbia by the European Court of Human Rights and by the Serbian Constitutional Court. In their rulings these two courts have clearly stated that the Republic of Serbia has failed to establish a system of enforcement that would be in accordance with guarantees set by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The enforcement of civil judgments and other enforcement and authentic documents has been in the jurisdiction of civil courts for decades and they have failed to deliver expected results. Bearing that in mind, the Ministry of Justice proposed the delegation of judicial powers in enforcement procedure to new legal professionals – public enforcement agents. The first Law on Enforcement and Security that has introduced public enforcement agents has entered into force in 2011 and first public enforcement agents became operational in 2012. In its decision, the Serbian Constitutional Court has given its clearance for the delegation of judicial powers to public enforcement agents. For most of the enforcement measures this law has created a parallel jurisdiction of courts and public enforcement agents. Following three years of implementation of this law, enforcement by public enforcement agents

has prevailed. A new Law on Enforcement and Security has been passed by the Serbian Parliament in 2015 and has entered into force on July 1, 2016. This law has widened the competences of public enforcement agents substantially. With few exceptions, carrying out the enforcement is now the power of public enforcement agents, and enforcement courts are in charge for ordering enforcement and for deciding upon legal remedies. This new law has been one of the first significant steps in judiciary reform during the negotiations with the EU.

At the end of this review we would like to note that a full stenographic record of the Symposium in Russian was also published in the Journal "Herald of Civil Procedure," which contains the full speeches of all participants, including those not mentioned in this review.[2]

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[2] Стенограмма III Ежегодного симпозиума журнала "Вестник гражданского процесса" "2016 – Казанский арбитражный день: развитие верховенства права и региональные проблемы," 6 Вестник гражданского процесса 202 (2016) [Shorthand Report of the III Annual Symposium of the Journal "Herald of Civil Procedure" "2016 – Kazan Arbitration Day: The Rule-of-Law Development and Regional Problems," 6 Herald of Civil Procedure 202 (2016)].

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