

RUSSIAN LAW: A REVIEW OF 2007

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This note reviews the legal developments in Russia from the end of 2006 to early 2008. Some events discussed are obviously important; whereas others were simply of interest to the author. By far the most important development was the intellectual property law reform. There were also significant tax developments, including the Supreme Arbitrazh Court ruling on abusive tax schemes. Tax amnesty and the new participation exemption are worthy of note. Of general importance and considerable theoretical interest are the prohibition against contingency fees and the “rehabilitation” of the derivatives contract. We consider the new Russian legal approach to gambling. The remaining currency control restrictions were removed. And, although the Rakhmankov “phallic” case is not a binding precedent, it is instructive as to what is actually happening in Russia. A potentially important case of the European Court of Human Rights, *Biryukov v. Russia*, will also be considered.

Civil Code, Episode Four

The major legal development of the period under consideration was the Russian intellectual property law reform. The entire body of the previously existing intellectual property legislation has been repealed, effective from 1 January 2008. The new Part Four has been added to the Civil Code, being comprehensive and all-inclusive in the field of intellectual property.¹ To a large extent, however, Part Four is a restatement of the previous legislation. However, it does introduce some completely new concepts (e.g. “unified technology”) and addresses some hot issues (e.g., the issue of phoney right-management organizations and music-selling web sites licensed by such organizations).

Part Four is obviously intended, *inter alia*, to respond to international concerns related to Russian pirate web sites selling copyrighted music at fabulously low prices. Technically, the activities of the dubious sites were based on a loophole in the earlier Russian intellectual property legislation allowing rights-management organizations to manage, in some situations, intellectual property rights without the right owner’s permission.² Although this possibility exists in Part Four as a matter of principle, rights-management organizations engaged in such non-contractual licensing will be placed under State control. Also the spectrum of rights available for non-contractual management has been limited to only six items, not including “making [phonograms] publicly available (the so-called “internet right”

¹ Part Four appears in *ibid.*, as amended.

² S. Budylin and Yu. Osipova, “Is AllofMP3 Legal? Non-contractual Licensing Under Russian Copyright Law”, *Journal of High Technology Law*, VII (2007), p. 1.

(Article 1244, Civil Code). This provides legal means for resolving the pirate site problem.

The most notorious of such pirate sites was probably Allofmp3. Suit has been filed against it in the United States for \$1.65 trillion (sic).³ The site did not survive until Part Four entered into force in January 2008: it disappeared from the web in June 2007. Unfortunately, this hardly can be attributed to an improvement in the quality of the Russian legal system. In fact, in July 2007 the former head of Allofmp3, Denis Kvasov, was acquitted on criminal charges of copyright infringement. This is perhaps not surprising because the site operated under a license obtained from a rights-management organization. In August 2007 the site became available on the web again; although music is not currently sold.⁴ However, the site seems to simply have migrated to another domain.⁵

The reader is referred to other publications for further details of the Russian intellectual property law reform.⁶

Tax Amnesty

Various schemes for a tax amnesty have been discussed in Russia for at least a decade. Finally, a “tax amnesty” law (covering only individuals, not organizations) was adopted in December 2006 and entered into force in 1 March 2007.

The law is officially titled “On a Simplified Procedure of Declaring Revenue by Natural Persons”.⁷ According to the law, any natural person who failed to pay tax in respect of some revenue received before 1 January 2006 may pay the tax (to be exact, a “declaration payment”) now. The payment is made through a bank. The rate is only 13%, that is, equal to the current personal income tax rate. There is neither interest nor a fine. The payment must be made before 1 January 2008. No submission of papers to a tax agency is required. The taxpayer merely retains the declaration payment confirmation. A taxpayer having made the declaration payment related to some (earlier concealed) revenue is deemed to have fulfilled the duties as to declaring the revenue and paying the tax in respect of it. This apparently means that the taxpayer can not be later held civilly or criminally liable for that past non-payment if the declaration payment confirmation is produced. The amnesty is not applicable to persons previously convicted for tax evasion unless the record of conviction has been duly cancelled.

Generally, the terms of the amnesty seem quite favorable. However, somewhat surprisingly, the long-awaited amnesty attracted little attention from either the

³ S. M. Fulton, “US Music Publishers Sue AllofMP3 for \$1.65 Trillion”, *BetaNews*, 21 December 2006 (describing \$1.65 trillion lawsuit brought by Sony, EMI, Warner, Universal, and others against AllofMP3 in a United States federal court).

⁴ V. Kodachigov and I. Erokhina, “Allofmp3 прервал музыкальную паузу [Allofmp3 Interrupted a Musical Pause]”, *Коммерсантъ*, 28 August 2007.

⁵ See Message 23 on blogs.allofmp3.ru/music_news/2007/11/05/court-confirms-legality-of-allofmp3com/ (inviting Allofmp3 users to migrate to MP3Sparks).

⁶ S. Budylin and Yu. Osipova, “Total Upgrade: Intellectual Property Law Reform in Russia”, *Columbia Journal of East European Law*, 1 (2007), p. 1.

⁷ *СЗ РФ* (2007), no. 1(1), item 32.

mass media or the general public. There were no crowds in banks rushing to pay their back taxes. By 1 January 2008 (the end of the amnesty period), about 3.7 billion rubles (ca. \$150 million) of back taxes was collected.⁸ This is not particularly impressive when measured against, say, the high-profile corporate tax claim against the oil company Rusneft, amounting to 20 billion rubles (ca. \$800 million).⁹

Participation Exemption Introduced

As of 1 January 2008 a participation exemption provision has been introduced in Russian tax law. The exemption means that under certain conditions the dividends received by a holding company from other companies are exempt from corporate taxation.

The new provision provides that the corporate profit tax rate for a Russian organization in respect of an item of dividend revenue shall be zero, provided the following conditions are met: at the date of adoption of the dividend payment resolution the Russian organization (1) for at least 365 days uninterrupted (2) has owned at least 50% in the share capital of the subsidiary company, and (3) the share in the capital was acquired for at least 500 million rubles (currently about \$20 million). The participation exemption covers dividends received from both Russian and foreign subsidiaries, save for the dividends received from offshore zones designated as such by the Ministry of Finances of the Russian Federation.¹⁰

Arguably, the exemption is intended to make Russia an attractive jurisdiction for establishing holding companies. Currently many Russian entrepreneurs prefer to establish offshore companies for holding Russian assets. The world leader in accumulated foreign investments to the Russian economy is Cyprus, a traditional offshore base for Russian entrepreneurs.¹¹ Note, however, that the threshold for the newly introduced exemption is rather high.

Supreme Arbitrazh Court Ruling on Abusive Tax Schemes

On 12 October 2006 the Supreme Arbitrazh Court (SAC) issued a long-awaited ruling "On the Evaluation by Arbitrazh Courts of the Basis of Obtaining a Tax Benefit by a Taxpayer".¹² The document introduced into Russian tax law new concepts of "justified/unjustified tax benefit" and of "reasonable business purpose". In essence the ruling allows courts to review tax results of taxpayer transactions where the taxpayer structures operations not in accordance with a "reasonable business purpose" but rather with a view to obtain an "unjustified tax benefit".

⁸ M. Selivanova, "Амнистия окончена" [Amnesty is Over], *РБК daily*, 28 January 2008.

⁹ N. Skorlygina, "Руснефти сбивают цену [Rusneft Price is Beaten Down]", *Коммерсантъ*, 18 July 2007.

¹⁰ *СЗ РФ* (2007), no. 21, item 2462.

¹¹ Federal Service of State Statistics (Rosstat), *Об иностранных инвестициях в 2007 году* [On Foreign Investments in 2007].

¹² Decree of Plenum of Supreme Arbitrazh Court, 12 October 2006, No. 53. *Вестник ВАС РФ*, no. 12 (2006).

According to the ruling, a taxpayer is presumed to act in good faith. That is, even if the taxpayer takes actions resulting in a "tax benefit" (a decrease in its tax liability), these actions and the resulting tax benefit are presumed to be justified. However, a tax agency may seek to prove that the tax benefit is in fact unjustified. It may be held unjustified, in particular, if transactions are not accounted for in accordance with their economic purpose, or if the transactions accounted for are not attributable to a reasonable business purpose. The Court suggests a list of circumstances that may prove that the tax benefit was unjustified, such as the obvious impossibility for the taxpayer to carry out disputable transactions in reality (unrealistic amounts, etc.). The Court also suggests a list of "signals" that *per se* do not prove tax benefit to be unjustified, but may serve as evidence together with other proof. The list includes the creation of a company shortly before the transaction and the fact that the parties to the transaction are associated with each other. If the tax benefit is found to be unjustified, the court recalculates the tax liabilities in accordance with the real economic substance of the transaction.

To appreciate the legal status of the ruling, it should be recalled that Russia is a civil-law country. This means that no court judgment is precedential, at least in theory.¹³ However, some types of rulings of the highest judicial authorities are legally binding for lower courts. The Russian judicial system consists of two "parallel universes". Courts of general jurisdiction resolve disputes involving individuals who are not entrepreneurs. Their highest authority is the Supreme Court of the Russian Federation. The so-called "arbitrazh" (that is, economic) courts resolve disputes with the participation of companies and individual entrepreneurs. Their highest authority is the Supreme Arbitrazh Court of the Russian Federation. The third judicial authority empowered to issue legally binding rulings is the Constitutional Court of the Russian Federation, reviewing, in particular, the constitutionality of statutes and interpreting the Constitution.

The document under discussion is a ruling of the Plenum of the Supreme Arbitrazh Court, legally binding upon all arbitrazh courts, although not upon courts of general jurisdiction. That is, for arbitrazh courts this ruling is as binding as an act of legislation. The ruling can be viewed as an elaboration of the doctrine of a "bad-faith taxpayer" introduced in 2001 by the Constitutional Court, which authorized non-application by courts of certain (beneficial) tax law provisions to such taxpayers.¹⁴ The doctrine was enthusiastically adopted by some courts to disallow any tax optimization. The 2006 ruling apparently seeks to limit the discretion of courts in determining whether the taxpayer acted in bad faith, on the basis of the "business purpose" theory.

The 2006 ruling (and its predecessor, the 2001 Constitutional Court ruling) is especially intriguing as an example of court-made law in a civil-law country. Indeed, this is court-made tax law. Although the "business purpose" doctrine may

¹³ But see O. N. Sedukina, "К вопросу о нормотворческой деятельности высших судов России [On the Question of Law-Creation Activity of the Highest Courts of Russia]", *Российский судья*, no. 11 (2004), p. 15 (arguing that Russian courts do make law to a certain extent).

¹⁴ Ruling of the Constitutional Court of the Russian Federation, 25 July 2001, no. 138-О. *СЗ РФ* (2001), no. 32, item 3410.

be analogized to certain provisions of, for example, United States federal tax law, it is noteworthy that, while the United States is a common law country, at least some relevant provisions of its law are found in the Internal Revenue Code.¹⁵ In contrast, although Russia is a civil-law country, the provisions under consideration are not codified. Neither “unjustified tax benefit,” nor “reasonable business purpose,” nor “bad-faith taxpayer” doctrines are ever mentioned in the Russian Tax Code.

The unwritten character of such important tax law provisions raises questions about the certainty of Russian tax law, especially because of their potential retroactive application. Consider the following timeline. In 2000-2001 Yukos, a major Russian oil corporation, used for oil trading a number of shell companies incorporated in Russian regions with a low level of taxation. In 2001 the concept of a “bad-faith taxpayer” was authorized by the Constitutional Court (in relation to a very different tax scheme). In 2002 the Russian corporate taxation system was unified to eliminate low-tax zones, which made the scheme obsolete. In 2004 Yukos was found to be a “bad-faith taxpayer” in relation to the usage of the shell companies in 2000, and the taxes were recalculated (a similar decisions on taxes owed for later years came soon thereafter; the consequential new tax liabilities ultimately brought Yukos to bankruptcy). Based on this arbitrazh court judgment, in 2005 the former Yukos head Mikhail Khodorkovskii was found guilty of criminal corporate tax evasion (along with other charges) and sentenced to deprivation of freedom for nine years (later reduced to eight years) by a court of general jurisdiction. Only in 2006 did the SAC ruling originate arguably disallowing the use of shell companies because of the lack of a “reasonable business purpose”. The retroactive application of court-made tax law doctrines, especially in a civil-law country, and especially for the purposes of criminal jurisprudence, would seem to be doubtful.¹⁶

Contingency Fee Disallowed

Another example of court-made law in Russia, perhaps not having such far-reaching business implications but of interest to a foreign lawyer, is the effective prohibition of a contingency fee in legal service contracts sanctioned by the Constitutional Court in January 2007.

Back in 1999, the Supreme Arbitrazh Court issued an Information Letter providing that contingency-fee agreements for rendering legal services are unenforceable against clients.¹⁷ SAC information letters, unlike SAC Plenum rulings, are not legally binding. However, for all arbitrazh courts (albeit not for courts of general jurisdiction) such letters naturally have persuasive value in practical

¹⁵ 26 U.S.C. § 482 (2007) (authorizing tax authorities to redistribute at their discretion taxable income between associated organizations “in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations”).

¹⁶ For more on the Yukos tax case and related constitutional issues, see S. Budylin, “Добросовестный или недобросовестный? Конституционные основы налогового планирования – новейшие тенденции [Good Faith or Bad Faith? Constitutional Basis of Tax Planning – Latest Tendencies]”, *Российская юстиция*, no. 11 (2006), p. 36.

¹⁷ Information Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, 29 September 1999, No. 48. *Вестник ВАС РФ*, no. 11 (1999).

terms – the force of law. Thereafter, arbitrazh courts consistently refused to enforce such agreements. Note that Russian legal ethics rules *allow* the contingency fee in agreements related to pecuniary disputes.¹⁸ Law firms have always been unhappy with the *de facto* prohibition of the contingency fee, and one challenged the constitutionality of this interpretation of the law in the Constitutional Court.

The Constitutional Court, however, found the interpretation to be constitutional, indicating that the definition of the service provision contract given by the Civil Code envisages the “performance of certain actions,” not “reaching a certain result”.¹⁹ Therefore, the argument goes, a success-based fee is impossible in service provision contracts. This apparently means the prohibition of result-based fees in all service provision contracts, without limiting it to legal services.²⁰

Derivatives No Longer Suspect

In January 2007, the Civil Code (Article 1062) was amended to overrule a court-made law provision stipulating the unenforceability of forward contracts.²¹

A forward contract is entered into to buy or sell an agreed quantity at an agreed future date and at an agreed price. To understand why forward contracts might be deemed unenforceable, a brief excursion into recent Russian history is necessary.

In 1998 Russia defaulted on its domestic debt and its financial system collapsed. At the moment of the default, a substantial amount (estimated at \$6 billion) of liabilities of Russian banks happened to be accumulated in forward contracts with foreign investors.²²

Apparently in a desperate attempt to preserve the sinking bank system, the Supreme Arbitrazh Court in 1999 upheld the practice of lower courts to classify forward contracts as gambling transactions (sic).²³ This was because (the argument goes) the financial results of such contracts are dependent upon unpredictable future market price changes. While gambling is generally allowed in Russia, gambling contracts are, with certain exceptions, unenforceable (to use the statutory language, relevant claims “are not subject to judicial defense”) (Article 1062, Civil Code). If so, the SAC concluded, forward contracts should not be enforced, unless the parties had in mind the actual delivery of the underlying asset or another similarly reputable business purpose.

¹⁸ The Code of Professional Ethics of an Advokat is transl. in W. E. Butler, *Russian Public Law* (2005), pp. 812-824.

¹⁹ Decree of the Constitutional Court of the Russian Federation, 23 January 2007, No. 1-П. *СЗ РФ* (2007), no. 6, item 828. See para. 3.1.

²⁰ For further discussion, see: S. Budylin, “Непринудительные сделки в российском праве [Unenforceable Transactions in Russian Law]”, *Журнал российского права* [Journal of Russian Law], no. 3 (2007), p. 56; see also S. Budylin, “A Comparative Study in the Law of the Non-existent: Contract Invalidity in the U.S. and Russia”, *Currents: International Trade Law Journal*, XV, no. 2 (2006), p. 28.

²¹ *СЗ РФ* (2007), no. 5, item 558.

²² A. J. Chiodo and M. T. Owyang, “A Case Study of a Currency Crisis: The Russian Default of 1998”, *Federal Reserve Bank of St. Louis Review*, LXXXIV, no. 6 (2002), p. 7.

²³ Decree of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, No. 5347/98, 8 June 1999. *Вестник ВАС РФ*, no. 9 (1999).

This was not a legally binding SAC Plenum ruling, merely a case resolved by the SAC Presidium acting as the last appellate instance. However (needless to say), all arbitrazh courts immediately adopted the SAC rule. Although the case related to forwards only, similar argumentation was obviously applicable to other derivative contracts, such as futures or options. The ruling all but destroyed the Russian financial derivative market.

The constitutionality of this peculiar application of gambling law was challenged by a foreign investor in the Constitutional Court, but with no success. In 2002 the Court refused to consider the claim, thus effectively upholding the SAC rule.²⁴ The Constitutional Court urged law-makers to settle the issue by legislation, which they did, albeit four years later.

According to the amendment to the Civil Code (Article 1062[2]), transactions dependent upon future variations of prices, exchange rates, interest rates, and so on are not considered as gambling transactions. Relevant demands are protected by courts, provided that at least one party to the transaction is a bank or a licensed security-market professional company, or else is licensed to transact on an exchange. However, if a demand is related to the participation of individuals (not organizations) in such transactions, it is protected only if the transactions were carried out on an exchange. Obviously, the provision is worded to cover forwards, futures, and options.

The organized market of derivatives is now safe from the judicially unleashed unenforceability plague.

Gambling Business Zoning

As mentioned above, gambling is allowed in Russia, although gambling contracts are generally unenforceable. Until recently, numerous casinos flourished in Moscow and other cities of Russia. But at the end of 2006 gambling legislation was adopted that drastically reduced the gambling business to four "gambling zones," none of which is close to Moscow or St. Petersburg. The removal of the gambling business to the zones is to be completed by 2009.

The law introduces a completely new legal environment for the gambling business. The business can be carried on only by Russian juridical persons and only in the designated gambling zones. The required minimum net worth of a gambling business is 600 million rubles (ca. \$24 million) for casinos and game machine halls, and 100 million rubles (ca. \$4 million) for bookmaking offices and totalizators. For any game machine its technical average win rate must be at least 90%. Minors (below 18) are not allowed in gambling establishments. Bookmaking offices and totalizators are excluded from zoning. Lotteries are not covered by the law. Any gambling business via a telecom network, including the Internet, is prohibited. However, the law does not attempt to restrict gambling transactions of Russian residents with foreign-based Internet casinos.

²⁴ Ruling of the Constitutional Court of the Russian Federation, No. 282-O, 16 December 2002. *C3 PΦ* (2002), no. 52, item 5291.

Gambling zones have been created in the Altai Territory (Siberia), the Maritime Territory (Far East), Kaliningrad Region (a Russian enclave in the European Union), and on the border of Krasnodar Territory and Rostov Region (Russian South). For carrying on gambling business even in a gambling zone, an individual authorization from the local authorities is required. While the zoning is to be completed by 1 July 2009, regional authorities were authorized to prohibit gambling business on their respective territories as early as 1 July 2007. Many did so. In fact, by that time most gambling businesses had to close anyway because of the high capital requirements.

In sum, the legal regime for the Russian gambling business has changed from nearly absolute permissiveness to an almost complete ban, save in only four "reservations." The U-turn is to be completed in 2009.

Currency Control Restrictions Abolished

In June 2006 most currency-control restrictions for transactions between residents and non-residents of Russia were removed by legislative amendments and Central Bank regulations, and from the beginning of 2007 the remaining restrictions expired under the terms of the currency legislation itself.²⁵

Currency control is still in place: Russian banks have to check documentation related to any foreign currency transactions between residents and non-residents of Russia. However, no current or capital transactions of residents with non-residents are now prohibited, require permission, are subject to reserve requirements, require special types of accounts, or are in any other way restricted.

Constitutional Guarantee as a Phallic Symbol

The Rakhmankov satire case²⁶ is not a legally important precedent, but in some way is enlightening for insight into the current legal and political situation in Russia. The case could be seminal for Russian constitutional law, comparable to what the Hustler parody case is for the law of the United States,²⁷ or the Strauss caricature

²⁵ Federal Law of 10 December 2003, No. 173-Φ3. *C3 PΦ* (2003), no. 50, item 4859. Last amended by on 30 October 2007, No. 242-Φ3. *C3 PΦ* (2007), no. 45, item 5419.

²⁶ The case was not officially published. For a media account, see Brian Whitmore, "Russia: 'Phallic' Case Threatens Internet Freedom", *Radio Free Europe/Radio Liberty*, June 2, 2006. Accessible on: www.rferl.org/features/features_Article.aspx?m=06&y=2006&id=DF7B2E15-2F9F-4A8B-AAF0-A7622F0D33F7 (for Russian-language information sources, see: www.cursiv.ru/news).

²⁷ A magazine published a parody "interview" with a nationally known protestant minister describing his first sexual experience as occurring with his mother. A jury awarded damages to the minister to compensate for emotional distress. The U.S. Supreme Court reversed, holding that the constitutional free-speech guarantee prohibits awarding damages to public figures to compensate for emotional distress intentionally inflicted upon them unless they can show that the statements that gave rise to the distress were false statements of fact made with "actual malice" (that is, the person that made those statements knew they were false or acted with reckless disregard for the truth in making the statements). U.S. Supreme Court, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

case is for German law.²⁸ But, unfortunately, the Russian case has never reached a court of a high enough level to reliably test any constitutional issues. And this fact is in itself indicative.

Vladimir Rakhmankov is the editor of a small web news service "Cursive" [Italic] based in Ivanovo, Russia. On 18 May 2006 he published on the site of Cursive his own article "Putin as a Phallic Symbol of Russia." There Mr. Rakhmankov in satirical form discussed a recent address of President Vladimir Putin to the Federal Assembly (the Russian parliament) where the president urged that demographic problems of Russia be resolved by drastically increasing the birth rate. The author, rather good-humoredly, noticed that animals in the local zoo apparently enthusiastically responded to the call of the president, judging by the press-release of the local administration; however, he described the president's speech itself as "semi-delirious". He also stated that "Putin is really like a phallic symbol of the country – in all senses" (whatever this might mean). In essence, that is it: nothing more striking than that was said in the short feuilleton.

The next day investigators from the regional procuracy arrived with an order for the instituting of criminal proceedings. The office of the news service and the apartment of Mr. Rakhmankov were searched, and his personal computer was confiscated. Some days later the Internet provider closed the site of the newspaper without any court order. Later several different hosters in turn closed the site, reportedly upon the informal advice of the Federal State Security Service (FSB) officers; finally the site moved to the United States.

The 1993 Russian Constitution guarantees to everyone the freedom of speech and thought, as well as the freedom of mass media (Article 29). However, according to the Constitution itself, "[t]he effectuation of the rights and freedoms of man and citizen must not violate the rights and freedoms of other persons" (Article 17[3]). In practice this means that even unconditionally stated constitutional rights may be interpreted in a very restrictive manner, depending upon the situation. "Rights of other persons" include, in particular, the right for human dignity (Article 21). There are also other reasons to limit constitutional rights. It should be noted that "[t]he rights and freedoms of man and citizen may be limited by a federal law" – but "only to the extent to which this is necessary for the purposes of defence of the foundations of the constitutional system, morality, health, rights and legal interests of other persons and ensuring the defense of the country and security of the state" (Article 55). The president, by the way, is the "guarantor" of human rights and liberties, as well as of the Constitution itself (Article 80). Even though Russia is a civil-law country, the interpretation of such openly conflicting provisions is up to the courts, ultimately to the Constitutional Court. The case promised much for constitutional law – but the promise has not realized.

²⁸ A magazine published a caricature depicting the Bavarian Minister-President as a sexually active pig. The publisher was found guilty of criminal defamation. The Federal Constitutional Court dismissed publisher's constitutional complaint, holding that caricatures that attack the core of constitutionally protected personal honour are not covered by the constitutional freedom of artistic activity. German Federal Constitutional Court, BVerfGE 75, 369 (1987).

Mr. Rakhmankov was prosecuted for “insult of a representative of power” (Article 319, Criminal Code). Note that this crime is found in the Section X of the Criminal Code (“Crimes against State Power”) rather than in the Section VII (“Crimes against the Person”), which might mean that the freedom of expression here is balanced against State security rather than against the human dignity. The defendant was found guilty by a judge and sentenced to a fine of 20,000 rubles (about US\$800). The appeal was dismissed by Ivanovo Region Court (9 January 2007). The materials of the file of the case have not been published (publishing decisions of courts of general jurisdiction is not usual practice in Russia), but apparently no constitutional issues have been tested by the courts. The case has never reached either the Supreme Court or the Constitutional Court. Rakhmankov reportedly intends to appeal to the European Court of Human Rights (in Strasbourg).

If the procurator intended to stop the dissemination of the satire, he was unsuccessful: the Russian section of the web swarms with copies of the article. Journals in hard copy are generally more careful, because they are regulated by the law on mass-media and may be easily shut down for publishing illegal materials. In June 2007 high-ranking representatives of both the General Procuracy and the Federal Security Service publicly opined that the State has to begin controlling Internet content because of the need to combat extremism.

In constitutional law interpretation is everything. The constitutions of the United States, Germany, and Russia unequivocally declare the freedom of expression to be protected. However, practical applications are quite different in the three countries. Whereas in the United States the freedom to insult political figures is, for practical purposes, virtually unlimited, in Germany the freedom of expression is heavily counterbalanced by the political figure’s right of human dignity. In Russia the “freedom to insult” is non-existent: few people, let alone courts, seem to apprehend any constitutional problem with a specific criminal sanction against insulting official figures.

Who Has Jurisdiction over a Website?

In March 2008 the Supreme Court declined jurisdiction over a request to shut down the web site *Ingushetiya.ru* for its allegedly illegal content. The reason is that the site is “registered” in the United States. Besides political reverberations, the decision seems to have important legal implications for the web community in general.

Ingushetia is a republic of the Russian Federation adjacent to Chechnya and populated with the Ingush people. *Ingushetiya.ru* is a site of the Ingush opposition. The Ingush authorities dislike the site, and they dislike the opposition itself. The Procurator of Ingushetia filed a civil suit at the Ingushetia Supreme Court asking to enjoin the activity of the site because of its allegedly illegal content (note that Russia does not have separate court systems for subjects of the Federation; the Ingushetia Supreme Court is a part of the federal court system with the Supreme Court of the Russian Federation as its higher court.) However, the Ingushetia Supreme Court dismissed the claim (without prejudice) on lack of jurisdiction grounds (8 February 2008). The Procurator reportedly was recommended to file

his suit “at the place of the site registration, that is, in the United States”. The Procurator instead appealed to the Supreme Court of the Russian Federation. But the Russian Supreme Court dismissed the appeal and affirmed the Ingushetia Supreme Court (18 March 2008).

This raises interesting jurisdictional issues in relation to web sites. Apparently, the hosting services for the site are provided by a United States company. However, since the site is in the “ru” zone, its domain name (Ingushetiya.ru) was in fact registered by a Russian company. As a practical matter, there probably would be no problem with deregistering the domain name on the order of a Russian court. The more remarkable is the Supreme Court abstinence.

The case discussed above is a civil suit. It is to be distinguished from a parallel criminal case. Criminal proceedings are underway based on the publication on the same site of the materials allegedly inciting ethnic hatred (which is a criminal offence). These criminal proceedings were instituted in Moscow (30 July 2007).

As usual, the case is unpublished; the above is based on media reports.

ECHR Disapproves Russian Practice of Pronouncing Judgments

This section is devoted a European Court of Human Rights case, *Biryukov v Russia*.²⁹ The case may (or may not) have far-reaching implications for the standard Russian practice of not making court judgments public (at any rate, in their entirety).

Every person can sue their country in the ECHR for a Convention violation. The Strasbourg court can not reverse national courts, but can award damages to the victim. Russia is the most-sued country: one-fifth of all Strasbourg cases are against Russia as of the beginning of 2007. Proposed legislation reportedly being drafted under the auspices of the Supreme Court of the Russian Federation, is supposed to create first-instance jurisdiction of the Supreme Court (and perhaps of the Supreme Arbitrazh Court in some cases) over suits against the State for human right violations. Apparently, the idea is to at least partly redirect the suit flow from Strasbourg to Moscow.³⁰

The Convention stipulates that court judgments, as a general rule, “shall be pronounced publicly”³¹ Russian law says the same thing, albeit allowing certain exceptions.³² However, in complex cases the court often pronounces only the introductory and operative parts of the judgment, whereas the full-text reasoned judgment is handed to participants later.³³ This reasoned judgment, usually, is neither published nor made publicly accessible in any other way.

²⁹ ECHR, *Biryukov v Russia* [17 January 2008] No. 14810/02.

³⁰ O. Gerasimenko, “Верховный Суд хочет прав человека [Supreme Court Wants Human Rights]”, *Gazeta.ru*, 16.07.2007. Accessible on: www.gazeta.ru/2007/07/16/oa_244533.shtml

³¹ Convention, at art 6(1).

³² П. 8 ст. 11 АПК РФ; п. 8 ст. 10 ГПК РФ; п. 7 ст. 241 УПК РФ.

³³ П. 2 ст. 176 АПК РФ; ст. 199 ГПК РФ; п. 4 ст. 310 УК РФ.

Biryukov was injured in a road incident; his arm was broken and later amputated. He filed a malpractice suit in Russia against the hospital. He lost the case both at first instance and on appeal. In both instances the reasoned judgment was not pronounced in court but rather was delivered to the parties *post factum*.

Biryukov filed a claim at the ECHR. The Strasbourg court upheld the claim, noting that the full text of the judgment was neither "pronounced" in the literal sense nor made public in any other way. This was held to violate the Convention. However, the Court rejected Biryukov's claim for compensation for lost wages and mental suffering resulting from his invalidity. The Court indicated, quite reasonably, that the damage was not caused by the violation of the Convention by Russia.

Ultimately, the standard practice of Russian courts was held unlawful under the Convention, but no sanction for the breach was imposed. It seems unlikely that such a decision will induce Russian courts or the legislature to change the questionable practice. Only in rare cases do Russian judges pay attention to ECHR case-law at all.³⁴

Conclusion

The year 2007 in Russia was marked by important and generally positive developments in business-related law, including intellectual property law, tax law, and currency control law. Developments with political overtones were less inspiring, as the Rakhmankov case arguably illustrates.

³⁴ A. L. Burkov, "Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts", *Russian Law: Theory and Practice*, no. 1 (2006), pp. 68-76.