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Dear Readers,

I am delighted to welcome you to the third regular issue of the Kazan University Law Review 2017.

This issue of the journal presents articles on current topics in theory and practice of Russian and foreign law.

The opening article by Vladimir Orlov and Vladimir Yarkov, esteemed scholars, our colleagues from Finland (University of Helsinki) and Russia (Ural State Law University), is about the specifics of recognition and execution of international arbitration decisions. This topic is extremely relevant today in connection with the ongoing reforms in Russia in the field of arbitration and arbitration proceedings. The authors of the article note that the new Russian arbitration law has improved the regulation of arbitration in Russia with respect to the system of internal arbitration by providing adequate rules for the organizational and procedural bases for arbitration, decision-making and termination of proceedings, "friendly proceedings" and recourse against the arbitral award, and also the rules on responsibility for the enforcement of the award. The provisions of the new law follow the UNCITRAL Model Regulations while maintaining some of the features that are typical only of Russian legislation in the field of enforcement of arbitral awards.

The article by our colleague Professor Dr. Michael Stürner, M. Jur. (Oxford University), University of Konstanz, Judge at the Higher Regional Court of Karlsruhe, examines the role of the German Supreme Court in the system of civil justice. After a brief overview of the institutional aspects, the author devotes his attention to the subject of access to justice in the federal courts, as well as evolving judicial control in the area of appeal.

Russian law, and especially the science of criminal law, is the subject taken up by Anatoly Naumov in the article by this outstanding graduate of Kazan University, Professor of the Academy of the General Prosecutor's Office of the Russian Federation, who gives a detailed account of this field of law. It is fortunate for us that the author devoted his studies to the history of the formation and development of the School of Criminal Law at Kazan University. His article highlights the scientific traditions formed in Kazan and shows their role in modern criminal law, including the interpretation of the rules of criminal law legislation relevant today.

This issue's Comments section contains a joint article by two of our colleagues from Russian universities, Dmitry Lipinsky, Doctor of Law, Professor, Togliatti State

University, and Konstantin Evdokimov, Associate Professor, Irkutsk Law Institute (Branch) of the Academy of the General Prosecutor's Office of the Russian Federation. Their subject is comparative legal research devoted to the criminal law legislation of the Russian Federation and foreign countries covering responsibility for committing computer crimes. Comparative legal analysis was conducted by the authors at the level of the national criminal law systems (Russia, the USA, China, France, Germany, and other countries) and at the level of legal families: the Anglo-American (the UK, the USA), the Roman-Germanic (Russia, France, Germany, Italy, etc.), Scandinavian (Sweden, Denmark), and Socialist (China). It is noteworthy that the criteria for comparative legal study were: the source of law that criminalizes the commission of computer crimes as well as objective and subjective elements of the crime.

Closing out the practical part of the issue, Conference Reviews contains descriptive pieces by lawyers from Kazan, who review two law events of this autumn: "Review of the Kazan International Legal Forum (KAZAN LEGAL, 14–16 September 2017)", and "Review of the IV Annual Symposium of the Journal *Herald of Civil Procedure*: "2017 – E-justice and information technologies in civil procedure (29 September 2017)".

I extend a warm welcome to each of you and wish you a stimulating and rewarding reading experience.

With best regards,
Editor-in-Chief
Damir Valeev

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Vladimir Orlov
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NEW RUSSIAN ARBITRATION LAW

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Abstract: The article deals with the new Russian legislation on arbitration concerning entrepreneurial (commercial) disputes, the process which is intended to be an alternative to judicial proceedings and, consequently, a means to reduce legal intervention in entrepreneurial activities. The new Russian Arbitration Law of 2015 has improved the regulation of arbitration in Russia concerning, in particular, the system of domestic arbitration by providing adequate rules on the organizational and procedural framework for arbitration, including the provisions on arbitration agreements, composition of the arbitral tribunal and its jurisdiction, on the conducting of arbitral proceedings, the making of awards and termination of proceedings, including the rules concerning settlement, on amicable proceedings and recourse against the award, as well as on liability rules and rules on the enforcement of arbitral awards. Furthermore, the new Russian legislation on arbitration contains the rules on the foundation and activity of permanently functioning arbitral institutions in the Russian Federation. Especially significant are the

rules strengthening the position of institutional arbitration providing court assistance. The provisions of the new Arbitration Law have followed the UNCITRAL Model Law, preserving, however, some features characteristic of Russian law. In particular, this concerns the multitude of mandatory rules regulating domestic arbitration.

Keywords: institutional arbitration, ad hoc arbitration, arbitration rules, arbitral tribunal, proceedings, award, enforcement

GENERAL PROVISIONS

Arbitration concerning entrepreneurial (commercial) disputes, represented as institutional and ad hoc formations, is recognized in Russia and has recently become subject to changes introduced by new legislation,[1] including particularly the (Domestic) Arbitration Law of 2015,[2] which has entirely replaced the previous law on arbitration (of 2002); it has also amended the regulation related to international commercial arbitration.[3] Entrepreneurial disputes in Russia are basically subject to the competence of the state commercial courts (arbitrazh courts), the provisions on which are contained in

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[1] This subject is covered in Orlov, Yarkov (2017) pp. 257–79.

[2] The Law on Arbitration (Arbitral Proceedings) no 382-FZ of 29 December 2015. The text in Russian is available on the website of Rossiyskaya Gazeta: http://www.rg.ru/2015/12/31/arbitrazh-dok.html) and on the website of KonsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_191301/ (last accessed April 5, 2017). In English, the Law is commented on at http://www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/5J1W-5K01-DYW7-W0W6-00000-00/New-Russian-arbitration-laws and https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/russia (last accessed April 5, 2017).

[3] Arbitration was known in Russia even in the 19th century. The *judicial* system of the *Russian* Empire was familiar with it, since the provisions on arbitration were contained in the Charter of Civil Procedure of 1864. Arbitration procedures were very popular among entrepreneurs in Soviet Russia during the New Economic Policy era (1921-1928). Permanently functioning arbitration institutions—the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission—were established in the early 1930s. In particular, the Foreign Trade Arbitration Commission purported to serve the needs of Russia's foreign trade. Establishment of arbitral tribunals for the settlement of economic disputes between Russian legal persons was allowed in the Soviet Union beginning in 1959. In modern Russia before 2002, domestic arbitration for resolving economic disputes was regulated by the Decree of the Supreme Council of the Russian Federation of 1992, whereas foreign commercial arbitration, meaning, in particular, the International Commercial Arbitration Court (ICAC; the successor of the Foreign Trade Arbitration Commission) and the Maritime Arbitration Commission, is still subject to the provisions of the Law on International Commercial Arbitration of 1993 (as amended *in 2008 and 2015)*. The predecessor of the new law, the Law on Arbitration Courts in Russia of 2002, was intended to regulate domestic arbitration in Russia. For more on this subject, *see*, e.g.: Yarkov (2014), pp. 650–53; Butler (2009) pp. 184–90; Komarov (2001), pp. 87–94; Olshanskaya (2014), pp. 96–102. *See* also http://lawbook.online/arbitrajnyiy-protsess-rf/kratkaya-istoriya-razvitiya-arbitrajnyih-7719.html; http://jurkom74.ru/materialy-dlia-ucheby/istoriia-stanovleniia-arbitrazhnykh-sudov-v-rf; and http://www.tambov.arbitr.ru/about/istorija_sozdanija (last accessed June 8, 2017).

the Arbitrazh Procedure Code of 2002 (as amended in 2017);[1] the code has also become subject to changes introduced by new legislation, in particular by Article 9 of the Law on the Amendments to Some Legislative Acts due to the Adoption of the Arbitration Law (Amendment Law of 2015).[2] The Amendment Law has wrought substantial changes to the Law on International Commercial Arbitration of 1993 beyond the changes brought about by the Arbitration Law.

In the Russian reforms of arbitration legislation, the UNCITRAL Model Law (as amended in 2006) has been followed in particular.[3] The main intention of the reform performed through the Arbitration Law is to improve domestic arbitration. The new arbitration legislation also updates the international arbitration laws of Russia that apply in cases where the arbitral proceedings are held in Russia (international arbitration seated in Russia) and introduces licensing requirements for foreign arbitration institutions.

The Arbitration Law contains 53 articles and is divided into 12 chapters, in which there are, in addition to the general rules,[4] including the provisions on the application of the Law and the basic concepts used in the Law, also the rules that apply to the arbitration agreement,[5] the composition of the arbitral tribunal[6] and its jurisdiction,[7] the conducting of the arbitral proceedings[8] as well as the making of awards and termination of proceedings, including the rules concerning settlement.[9] The Law also includes the rules regulating the recourse against the award[10] and the enforcement of this.[11] Furthermore, the articles

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1 Law no 95-FZ of 24 June 2002. The text in Russian is presented on the website of KonsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_37800/ and on the website of Garant: http://base.garant.ru/71295532/#ixzz4ggPQp2aR.

The Arbitrazh Procedure Code is unofficially translated in English. *See* http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru072en.pdf (last accessed June 8, 2017).

2 Law no 409-FZ of 29 December 2015. The text in Russian is presented on the website of KonsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_191313/b5315c892df7002ac987a311b4a242874fdcf420/ and on the website of Garant: http://base.garant.ru/71295532/ (last accessed June 8, 2017).

3 Among the peculiarities of Russian arbitration law is that domestic and international arbitration are clearly differentiated even on the legislative level. The domestic law regulation is characterized by a multitude of detailed and mandatory rules such as arbitrator qualification requirements and rules on the operation of arbitral institutions. *See*, e.g., https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/russia (last accessed June 8, 2017).

4 Chapter 1.

5 Chapter 2.

6 Chapter 3.

7 Chapter 4.

8 Chapter 5.

9 Chapter 6.

10 Chapter 7.

11 Chapter 8.

of the Arbitration Law contain the rules on the foundation and activity of permanently functioning arbitral institutions in the Russian Federation,[1] the relation between arbitration and mediation proceedings[2] and the responsibility of the non-commercial organization at which a permanently functioning arbitral institution is established and of the arbitrator.[3] In addition, the Arbitration Law contains the final provisions, including the coming-into-force provision.[4] For the most part, the norms of the Arbitration Law are intended to be dispositive (default rules).[5] The Law on International Commercial Arbitration has content similar to the Arbitration Law, except for some details.

The Arbitration Law regulates, under the provisions of its Article 1 on its scope of application, the order of foundation and activities of arbitral tribunals and arbitral institutions permanently functioning in Russia as well as the arbitration (arbitral proceedings). The provisions of the law regulating the deposit of arbitral awards, orders of termination of arbitration, and case records[6] and the rules on making amendments to legally significant records[7] are to be applied not only to domestic arbitration but also, according to Article 1.2 of the Arbitration Law, to international commercial arbitration seated in Russia.[8] The same concerns the rules on:

- the foundation and activity of permanently functioning arbitral institutions in the Russian Federation;[9]
- the *relation between arbitration and mediation procedures*[10] and

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1 Chapter 9.

2 Chapter 10.

3 Chapter 11.

4 Chapter 12.

5 In turn, the Amendment Law of 2015 (as related to arbitration) contains provisions concerning the rules of the Arbitrazh Procedure Code on the right to address arbitrazh (Article 4), the scope of jurisdiction of arbitrazh courts (Articles 27, 31, 33, and 38), the witness (Article 56), the request by the arbitral tribunal to the arbitrazh court for assistance in obtaining evidence (Article 74[1]), the termination of the proceedings (Chapter 18), and corporate disputes (Chapter 28[1]), as well as the proceedings on cases related to assistance and control functions of the arbitrazh court in respect of arbitral tribunals (Chapter 30) and the proceedings on recognition and enforcement of foreign judgments and arbitral awards (Chapter 31).

The Amendment Law of 2015 has also brought changes to the Civil Procedure Code of 2002, which regulates the resolution of noncommercial civil law disputes.

6 Arbitration Law, Article 39.

7 *Ibid.,* Article 43.

8 The (Russian) International Commercial Arbitration Court (at the Russian Federation Chamber of Commerce and Industry; ICAC) is subject to the provisions of the Law on International Commercial Arbitration of 1993; the last amendments to the Law on International Commercial Arbitration were brought by the Amendment Law of 2015. On Russian international commercial arbitration *see* Karabelnikov (2013).

9 Arbitration Law, Chapter 9.

10 *Ibid.,* Chapter 10.

– the responsibility of the non-commercial organization at which a permanently functioning arbitral institution is established and of the arbitrator,[1] as well as the final provisions, including the coming-into-force provision.[2]

The scope of the Arbitration Law covers disputes between the parties of civil law relations, unless provided otherwise by the federal law;[3] the federal law may contain restrictions for submitting certain types of disputes to arbitration.[4] In turn, disputes between the parties of civil law relations related to foreign trade and other types of international economic relations may be subject to the application of the Law on International Commercial Arbitration and submitted to international commercial arbitration.[5]

The main concepts of the Arbitration Law, "arbitration" (*арбитраж*) and "arbitration proceeding" (*третейское разбирательство*), are used as synonyms and stand for the procedure of resolution of a dispute by an arbitral tribunal[6] that may *consist of a sole* arbitrator or a panel of arbitrators.[7] In Russian law, the concept of arbitration is, however, problematic, since the term "arbitration", which is translated into Russian as «*арбитраж*» or «*арбитражный суд*», is usually related to state arbitrazh courts, and these represent the commercial court system functioning alongside the general court system. Thus, in this article the terms arbitration and arbitration proceeding will not refer to the arbitrazh (or state commercial) court (proceedings) established to resolve entrepreneurial (economic) disputes.[8]

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1 *Ibid.,* Chapter 11.

2 *Ibid.,* Chapter 12.

3 *Ibid.,* Article 1.3.

4 *Ibid.,* Article 1.4.

5 *Ibid.,* Article 1.3.

6 Arbitration is defined in Article 2 of the Arbitration Law as the procedure of resolution of a dispute by an arbitral tribunal and of decision-making by it (arbitral award).

7 An arbitrator is, according to Article 2 of the Arbitration Law, a physical (natural) person who is chosen by the parties or chosen (appointed) in the order, agreed by the parties or established by the law, for arbitral proceedings. The activities of arbitrators as such are not entrepreneurial activities.

8 The notion of the necessity of special expertise and procedures for settling commercial or economic disputes is as old as the history of the Russian state starting, in particular, from the Moscow period, at the end of which the New Trading Charter of 1667 contained provisions on the custom courts. These courts were followed by commercial courts, the status of which was determined in the Statute of 1832. Commercial courts existed in Russia until the Revolution of 1917. The necessity of the special judicial bodies, instead of administrative procedures, for settlement of economic disputes (between state enterprises and organization) became obvious in the period of the New Economic Policy, and new arbitration commissions were established in 1922. They were, however, terminated and later replaced by the state arbitrazh bodies, which were quasi-judicial bodies founded by the Soviet government and other high executive authorities. At the beginning of the 1990s, the Soviet system of state arbitrazh bodies was, in turn, replaced by the arbitrazh courts (similar to commercial courts). For more on this subject, *see,* e.g.: Yarkov (2014), p. 2014; Butler (2009), pp. 184–90; Olshanskaya (2014), pp. 96–102. *See* also http://lawbook.online/arbitrajnyiy-protsess-rf/kratkaya-istoriya-razvitiya-arbitrajnyih-7719.html and http://jurkom74.ru/materialy-dlia-ucheby/istoriia-stanovleniia-arbitrazhnykh-sudov-v-rf and http://www.tambov.arbitr.ru/about/istorija_sozdanija (last accessed June 8, 2017).

Settlement,[1] the rules concerning which are contained in the provisions on the termination of arbitral proceedings, and mediation *(procedure),*[2] *as related to arbitrazh proceedings in the Arbitration Law,*[3] *are presented in this article as being forms of amicable proceedings (примирительные процедуры*).[4]

The Arbitration Law governs, generally, unless otherwise provided by the federal law, both arbitral tribunals administered by a permanent arbitration institution[5] and ad hoc tribunals formed by the parties to resolve a concrete dispute.[6] However, the Law makes a clear distinction between permanent arbitral institutions and ad hoc tribunals, and the formation and activity of permanently functioning arbitral institutions is subject to special provisions of the Arbitration Law. But the Law also contains the provisions regulating arbitration procedure followed by both arbitral tribunals administered by a permanent arbitration institution and ad hoc tribunals, where differences are also presented.

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[1] In Russian legal doctrine, settlement (мировое соглашение) is usually regarded as a specific civil law agreement that is aimed at final resolution of the dispute between the parties, is concluded during the course and within the framework of judicial proceedings, and is subject *to judicial enforcement* proceedings. *See,* e.g., Yarkov (2002), pp. 35–45; Kovalenko, A.G., Mohova A.A., Filippova (2014), p. 142; Andreeva (2015), pp. 556–61; Beltyukova (2016), pp. 684-86.

[2] Mediation proceedings (*процедура медиации*) are, under the law regulating mediation of 2010, a means to settle disputes through the assistance of a mediator *on the basis of a voluntary* agreement of the parties in order to achieve a satisfactory solution. A mediator is defined, in turn, in the law as an independent physical (natural) person who is invited by the parties to assist them as an intermediary in finding the solution based on the merits of the case. As distinguished from mediation, conciliation proceedings (*согласительные процедуры*), where the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement, are known in the constitutional and criminal law of Russia. *See,* e.g., http://www.jourclub.ru/33/1800/7/ and http://pandia.ru/text/77/339/92263.php (last accessed June 8, 2017).

[3] Arbitration Law, Article 49.

[4] Amicable proceedings (примирительные процедуры) represent *means of alternative* dispute resolution. They are alternatives to judicial proceedings, which are based on voluntary expressions of the will of the parties to the dispute and aimed at achieving a solution that is satisfactory to them. Russian civil procedural law and legal doctrine are familiar, particularly, with such *means of alternative* dispute resolution as negotiation (переговоры), reconciliation (сверка расчетов), mediation (медиация), and judicial settlement (судебное примирение) as well as amicable settlement (мировое соглашение). *See,* e.g., the Concept of a Single Civil Procedure Code of 2014. http://www.consultant.ru/document/cons_doc_LAW_172071/286c4f987b98907587862bc899c9b1c30c11321d/ (last accessed June 8, 2017).

[5] Administration of arbitration is defined in Article 2 of the Arbitration Law as the execution of a permanent arbitration institution of the functions of organizational support to arbitration, including assurance of the procedures of selection, nomination, or challenge of arbitrators, record keeping, arrangement of collection and distribution of arbitration charges, except for the direct dispute settlement functions of the arbitral tribunal.

[6] *Ibid*., Article 1.5.

ORGANIZATIONAL AND PROCEDURAL REQUIREMENTS FOR ARBITRATION

Russian law recognizes both institutional arbitration, practiced by permanent arbitral institutions, and ad hoc arbitration, and makes a clear distinction between them.

Ad hoc arbitration is generally understood as a type of arbitration, the establishment of which is agreed by the parties to the concrete dispute to be resolved. It is not administered by any arbitral institution. Therefore, the parties themselves select the arbitrators and *determine the* arbitration *procedure and this is usually based on* the UNCITRAL Arbitration Rules.[1] Contrary to institutional arbitral tribunals, ad hoc tribunals have no jurisdiction over corporate disputes and may not turn to the state courts to obtain evidence. Moreover, the parties to arbitral proceedings may not, in their arbitration agreement, exclude the right to challenge an arbitrator in the state court, as well as the right to challenge the arbitral award.

In accordance with Article 44 of the Arbitration Law, a permanent arbitral institution is to be established at a non-governmental organization, and its activity is subject to permission obtained by this organization from the Russian Government. However, the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation have continued to perform the functions of permanent arbitral institutions in accordance with the recently amended rules without obtaining special permission.[2] The duty to obtain a permit also applies to foreign arbitration institutions.[3]

To obtain a permit, the arbitral institution is to comply, according to Article 44.8 of the Arbitration Law, with (only) the following requirements. It must:

– submit the rules that comply with the Arbitration Law;

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[1] To assist ad hoc arbitral tribunals in Russia, the Rules of Assistance by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russia (ICAC) based on the UNCITRAL Arbitration Rules are applicable. *See* https://mkas.tpprf.ru/en/predisk/adhoc/ (last accessed June 8, 2017).

[2] Accordingly, the Chamber of Commerce and Industry has updated the procedural rules of the ICAC, and they also concern corporate disputes. *See* http://mkas.tpprf.ru/ru/ and http://mac.tpprf.ru/ru/news/pravila-arbitrazha-mak-pri-tpp-rf-i175255/ (last accessed June 8, 2017).

The present rules of the ICAC consist of (1) the Regulations on Organizational Principles of Activity of The International Commercial Arbitration Court at The Chamber Of Commerce and Industry of The Russian Federation, (2) the Rules of Arbitration of International Commercial Disputes, and (3) the Rules of Arbitration of Corporate Disputes as well as (4) the Schedule of Arbitration Costs. They have been translated into English. *See* http://mkas.tpprf.ru/en/documents/ (last accessed June 12, 2017).

[3] In order to obtain the permit, foreign arbitral institutions need only be internationally recognized; no other requirements are applicable to them. If a foreign arbitration institution does not obtain the permit, but still conducts arbitral proceedings in Russia, the award of its arbitral tribunal will be deemed to be an award of an ad hoc arbitral tribunal. Thus, a foreign arbitration institution may administer the arbitration seated in Russia, provided that it has obtained the permit from the Russian Government. And in administering corporate disputes, a foreign arbitration institution must publish the special rules for these disputes.

- submit a recommended list of arbitrators, which complies with the Law;
- ensure that the information provided with respect to the institution and its founders is true, and
- have a reputation for being an organization that will ensure a high level of arbitration activity.

The parties to the dispute that is subject to the arbitral proceedings at the arbitral tribunal established to settle their dispute may agree that the execution of certain functions of arbitral administration, including the appointment and challenging of arbitrators and termination of their mandates, be delegated to the permanently functioning arbitral institution, the rules of which include such activities. The execution of such functions by the arbitral institution does not mean recognizing the arbitral tribunal as being wholly administered by this arbitral institution.[1]

The rules of the permanently functioning arbitral institution must contain:

- the reference to the Arbitration Law and the Law on International Commercial Arbitration as the grounds of the activity of the permanently functioning arbitral institution;[2]
- the species of disputes that are administered by the arbitral institution;
- qualifications and other requirements for arbitrators listed by the arbitral institution;
- the organizational structure of the arbitral institution and the order of formation of its bodies as well as the power and functions of its officers participating in the administration of arbitration;
- concrete functions of the arbitral institution that are related to the administration of arbitration, including assistance in composing the arbitral tribunal, the handling of challenges, the organization of documentation and the execution of payments;
- the order of the arbitral proceedings corresponding to their rules;
- the differentiation of the competence between the arbitral tribunal and the arbitration institution;
- the applicable standards on impartiality and independence of arbitrators; and
- the fixed amounts of costs and the rules on determination of costs and their division.[3] [4]

In turn, the order of the arbitral proceedings established in accordance with the rules of the permanently functioning arbitral institution must indicate:

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[1] Arbitration Law, Article 44.19.

[2] The arbitral institution may have several rules and, also, mixed rules, which are intended for different kinds of disputes: international commercial arbitration, domestic arbitration, expedited proceedings, arbitration of certain disputes, arbitration of corporate disputes (Arbitration Law, Article 45.2).

[3] *Ibid.,* Article 45.4.

[4] Permanent arbitral institutions are responsible only for organizational support. They have no powers to resolve disputes.

- the order of filing of a statement of claim and a statement of defense;
- the order of the filing of a counterclaim;
- the determination of arbitration costs and their division between the parties;
- the order of presentation, submission, and delivery of documents;
- the order of composition of the arbitral tribunal;
- the grounds and order for solving applications for the challenge of arbitrators;
- the grounds and order for the termination of the arbitrator's mandate and the replacement of arbitrators;
- the term of the proceedings;
- the order of hearings and (or) written proceedings;
- the grounds and order for the suspension or termination *of the arbitral* proceedings;
- the order and terms for the making, execution, and delivery of the arbitral award;
- the order of correction and interpretation of arbitral awards and the making of additional awards; and
- the power of the parties and arbitral tribunal with respect to the determination of the order of the arbitral proceedings and the issues in respect of which the deviations from *the arbitration* procedure or the specification of them by conclusion of the agreement of the parties and (or) by issuance of a procedural order by the arbitral court.[1]

The rules of the permanently functioning arbitral institution may include, in addition to those mentioned above, other provisions *that are not contradictory* or inconsistent with the law. But the provisions that must be agreed only directly between the parties under the Arbitration Law may not be contained, according to Article 7.12 of the Law, in the rules of the permanently functioning arbitral institution. Furthermore, the order of the arbitral proceedings may provide that, by their agreement, the parties are not entitled to make any changes to the rules of the arbitral proceedings except for the provisions that may be, in accordance with the Arbitration Law, directly agreed by the parties.[2]

According to Article 45.9 of the Arbitration Law, the provisions of the rules of the permanently functioning arbitral institution that are *contradictory to the law are regarded null and void, and this may be the ground for revocation (setting aside) of or refusal to enforce the arbitral award.*

The activity of a permanently functioning arbitral institution may be terminated under Article 48 of the Arbitration Law by the decision of the non-commercial organization at which a permanently functioning arbitral institution is established or of the arbitrazh court in cases where numerous serious violations of the law have resulted in damage to the parties or third parties and orders to cease violations have not been

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[1] Arbitration Law, Article 45.5.

[2] *Ibid.,* Article 45.6.

complied with. Such a termination is not considered as grounds for revocation *of or refusal to enforce an arbitral award.*

As an exception to the general prohibition of any judicial interference in arbitral activities expressed in Article 5 of the Arbitration Law, the Law also provides the rules that allow the courts to assist in the arbitration procedure. According to the default provisions of the Law, the state courts in Russia may assist arbitral tribunals by

- appointing[1] and challenging an arbitrator[2] and
- terminating the mandate of an arbitrator.[3]

With respect to arbitral tribunals administered by a permanent arbitration institution, the parties to an arbitration agreement may, however, exclude these issues from the consideration of the court.

The state court may also assist arbitration by:

- granting interim measures,[4]
- determining lack of jurisdiction of the arbitral tribunal,[5]
- obtaining evidence (except for ad hoc arbitration),[6] and
- terminating the activity of an arbitral institution.[7]

According to Article 1.3 of the Arbitration Law, the parties to civil law relations may, under their agreement, submit their dispute to arbitration (arbitral proceedings), unless otherwise provided by the Law.

The main rules on arbitrability of domestic disputes are contained in Articles 27[8] and 33[9] of the Arbitrazh Procedure Code. In accordance with these articles, any domestic civil law dispute that is related to economic activities is arbitrable by domestic arbitration, unless otherwise provided by a federal law. Non-arbitrable disputes are, under the Arbitrazh Procedure Code, insolvency (bankruptcy) disputes, disputes on avoidance or refusal in state registration of legal persons (e.g. corporations), and on other public law-related matters, including privatization, as well as certain intellectual property and corporate disputes; corporate disputes are subject to special rules of the Arbitrazh Procedure Code and Arbitration Law, which are presented below.

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1 *Ibid.,* Article 11.

2 *Ibid.,* Article 13.3.

3 *Ibid.,* Article 14.1.

4 *Ibid.,* Article 17.

5 *Ibid.,* Article 16.3.

6 *Ibid.,* Article 30.

7 *Ibid.,* Article 48.4.

8 Where the jurisdiction of arbitrazh (state commercial) courts is determined.

9 Which allows certain disputes under the jurisdiction of arbitrazh courts to be submitted to arbitration procedure.

International commercial disputes are, in turn, subject to the provisions of the legislation on international commercial arbitration in Russia.[1] In accordance with the provisions of Article 1.3 of the Law on International Commercial Arbitration,[2] disputes that could be submitted to the international commercial arbitration court are the civil law disputes arising in connection with foreign trade and other international economic relations between parties if:

- the place of business of one of the parties is located outside Russia or
- the place where a substantial part of the obligations is to be performed is located abroad or
- the place where the subject matter of the dispute is most closely connected with a foreign state.

In addition, disputes related to international investments in Russia or Russian investments abroad are under the jurisdiction of the International Commercial Arbitration Court.[3] [4]

Corporate disputes are defined, in accordance with Article 2.11 of the Arbitration Law, as disputes related to the establishment of a legal person in Russia, its management or participation therein, the parties of which are the founders and participants in the legal person (the participants) and the legal person itself, including disputes connected with the legal relation established between the legal person and a third party that are initiated by the participants in the event that the federal law[5] allows this.

Corporate disputes are subject to special rules of the Arbitration Law[6] and the Arbitrazh Procedure Code,[7] according to which they, if not excluded,[8] are exclusively

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[1] Based on the Law on International Commercial Arbitration of 1993 (as amended *in 2008 and 2015*). *See,* e.g.: http://base.garant.ru/10101354/ (last accessed June 8, 2017).

[2] *See* also §1 of the *Rules of the Court of International Commercial Arbitration of 2017*. https://mkas.tpprf.ru/ru/ (last accessed June 8, 2017).

[3] Furthermore, Article 1.4 of the Law on International Commercial Arbitration provides that, if a party has more than one place of business, the place of business is that which is of most relevance to the arbitration agreement. But if a party does not have a place of business, reference is to be made to his permanent residence.

[4] These provisions are different from the UNCITRAL Model Law.

[5] Arbitrazh Procedure Code, Article 225[1].

[6] Arbitration Law, Article 45.

[7] Arbitrazh Procedure Code, Article 225[1].

[8] Excluded under Article 225[1].2 of the Arbitrazh Procedure Code are the disputes that concern (a) the convening of general shareholders' meetings, (b) the activities of notaries on certification of transactions with participation interests in limited liability companies, (c) the strategic companies, except for disputes arising from the transactions on interests in such companies, which are not subject to governmental approval, (d) certain cases of buyback and compulsory buyout of shares by a company, voluntary, mandatory, and competitive tender offers and buyout of shares by shareholders, and (e) the expulsion of a participant from a legal person, as well as the disputes related to the challenging of non-normative legal acts, decisions and actions (inactions) of state and municipal bodies and other public authorities. *See,* e.g., https://www.morganlewis.com/~/media/files/document/chart-1-type-of-corporate-dispute.ashx?la=en (last accessed October 3, 2017).

to be arbitrated by arbitral tribunals administered by a permanent arbitration institution that follows the approved rules of arbitration on corporate disputes. Corporate disputes that are subject to such exclusive jurisdiction concern the foundation of a legal person in Russia, as well as its governance and participation in it. They also include disputes connected with the legal relation established between the legal person and a third party, provided that the parties are entitled under the law to initiate the proceedings.[1] In default of the approved rules of arbitration on corporate disputes, an arbitral tribunal administered by a permanent arbitration institution may settle disputes regarding the holding of shares and participating interests and the creation of encumbrance over and the exercise of rights arising from these (including disputes arising from share sale and purchase agreements) as well as disputes that are related to the activities of share registrars. Corporate disputes may also be settled in the (Russian) International Commercial Arbitration Court in accordance with the Rules on Arbitration of Corporate Disputes enacted by the Russian Chamber of Commerce and Industry in 2017.[2]

According to Article 45.8 of the Arbitration Law, the rules of arbitration on corporate disputes must contain:

- the duty of the permanently functioning arbitration institution to inform the legal person, against which the dispute has arisen, about the submitted claim and submit a copy of this to him and to place on its website the information about the submitted claim within three days of receiving the statement of claim;
- the duty of the legal person to inform its participants about the submitted claim;
- the right of each participant in the legal person to join the (further) proceedings at any stage by submitting his written application to the tribunal; and
- the duty of the arbitration institution to inform all the participants in the legal person, who have joined the proceedings, about the further course of the proceedings.

The rules of arbitration on corporate disputes must also provide that:

- the withdrawal from claim, the recognition of the withdrawal, and the conclusion of the settlement are allowed without the consent of all the participant in the legal

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[1] Additionally, certain disputes require that all the participants in a legal person and other parties to the dispute have concluded an arbitration agreement. These are the disputes concerning (a) the establishment, reorganization and liquidation of a legal person, (b) claims of shareholders for recovery of damages caused to a legal person and/or for application of the consequences of invalidity of such transactions; (c) the appointment/election and removal of the governing bodies of a legal person and their liabilities and the agreements between participants concerning management of the legal person, including corporate agreements, (d) the issuance of securities and (e) the challenging of decisions of the governing bodies of the legal person (Article 225[1].2).

[2] A dispute that is subject to the application of the ICAC Corporate Dispute Rules may relate to: (a) the establishment, reorganization and liquidation of a legal person, (b) claims of shareholders for recovery of damages caused to a legal person and/or for application of the consequences of invalidity of such transactions, (c) agreements regarding corporate governance, (d) the issuance of securities, (e) the challenging of decisions of the governing bodies of the legal person, and (f) the disclosure of information to shareholders.

person, who have joined the proceedings, except for the case when a participant submits his objection against that, and the tribunal states that the participant has legal interest for the continuation of the proceedings.

An arbitration agreement comprehends, according to Article 7 of the Arbitration Law, an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them with respect to a concrete legal relationship, whether contractual or not.[1]

An arbitration agreement is to be in writing (contained in a document signed by the parties) and may be concluded in the form of an arbitration clause in a contract[2] or in the form of a separate agreement.[3] An arbitration agreement is considered concluded also in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. Moreover, the reference in a contract to a document containing an arbitration clause is regarded as an arbitration agreement in writing, provided that the reference is to be regarded as a part of the contract.[4] An arbitration agreement concerning corporate disputes (exclusively arbitrable by arbitral tribunals administered by a permanent arbitration institution) could be included in the charter of a legal person[5] (excluding the cases of joint-stock companies with more than 1,000 shareholders and public companies).

An arbitration agreement is by nature an independent agreement, and this also concerns arbitration clauses. Thus, the invalidity of the contract does not mean the invalidity of the arbitration clause; moreover, any doubts as to the validity of an arbitration clause are to be interpreted in favor of its validity and enforceability. Furthermore, the arbitration rules that are referred to in the arbitration agreement are regarded, according to Article 7.12 of the Arbitration Law, as inseparable from these agreement.

The number of arbitrators is determined, according to Article 10 of the Arbitration Law, by the parties to arbitration, provided that the number is odd. In default of their agreement, the number of arbitrators ought to be three. According to the Arbitration Law,[6] the parties may, in principle, determine the appointment procedure. Failing such agreement, the arbitral tribunal is to be composed as follows:

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1 According to Article 38 of the Arbitration Law, the parties who have concluded the arbitration agreement are under the obligation to fulfill the arbitral award voluntarily.

2 An arbitration clause that is included in the contract concerns any disputes related to the conclusion of the contract and its entry into force and termination as well as its validity, including subsequent restoration, unless otherwise is agreed. This rule is different from the UNCITRAL Model Law.

3 An agreement is also regarded as concluded in writing if it occurs by the exchange of documents by mail, telegraph, teletype, telephone, electronic, or other communications enabling reliable determination of the fact that the document comes from the other party.

4 An arbitration agreement could be contained in rules on the organization of auctions and clearings.

5 This is different from the UNCITRAL Model Law.

6 Arbitration Law, Article 11.

– in an arbitration with three arbitrators, each party appoints one arbitrator, and these two arbitrators are to determine the third arbitrator, and
– in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he is to be appointed, upon request of a party, by the competent court.[1]

The court is otherwise empowered, upon request of a party, to take the necessary measures, unless the agreement on the appointment procedure provides other means, for securing the appointment. However, with respect to arbitral tribunals administered by a permanent arbitration institution, the parties to the arbitration agreement may exclude the court from taking any measures related to the appointment of arbitrators.

According to the Arbitration Law,[2] the arbitrator(s) must correspond to the requirements provided by the Law as well as any additional requirements possibly agreed by the parties, which are intended to secure the appointment of an independent and impartial arbitrator(s). In accordance with the Arbitration Law,[3] the (candidate and the appointed) arbitrator must disclose to the parties and the tribunal without delay any circumstances that render his/her impartiality or independence doubtful.

According to the Arbitration Law,[4] an arbitrator may be challenged, however only if circumstances exist that give rise to justifiable doubts in respect of his/her impartiality or independence, or if he/she does not possess qualifications required by law or agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

The parties may agree, under the Arbitration Law,[5] on the procedure for challenging an arbitrator. Failing such agreement, a party who intends to challenge an arbitrator must, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any obstacle preventing the arbitrator from serving as such, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his/her office or the other party agrees to the challenge, the arbitral tribunal must decide on the challenge. In the event of an unsatisfactory decision by the tribunal, the issue becomes subject to court proceedings. However, with respect to arbitral tribunals administered by a permanent arbitration institution, the parties to an arbitration agreement may exclude from the court *the power to decide on* the challenge of arbitrators.

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[1] The references to a competent court in the Arbitration Law generally stand for the references to the arbitrazh court in whose jurisdiction the case would lie otherwise (if not *dealt with in the arbitral* proceedings).

[2] Arbitration Law, Article 11.

[3] *Ibid.,* Article 12.

[4] *Ibid.*

[5] *Ibid.,* Article 13.

The arbitral tribunal may rule, according to Article 16 of the Arbitration Law, on its own jurisdiction, and this includes any objections with respect to the existence or validity of the arbitration agreement. Therefore, an arbitration clause that forms part of a contract ought to be treated as an agreement independent of the other terms of the contract. Thus, a decision of the arbitral tribunal that the contract is invalid is not to entail *ipso jure* the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction must be presented *by the party in question* not later than when he/she submits his/her first statement of defense. In turn, a plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as this question is raised during the arbitral proceedings.[1] In either case, a later plea is admissible in the event that the delay is justified. A preliminary decision of the arbitral tribunal on its jurisdiction may be appealed to the court. However, with respect to arbitral tribunals administered by a permanent arbitration institution, the parties to an arbitration agreement may exclude the right to such an appeal.

The Arbitration Law also contains default provisions on the power of the arbitral tribunal to order interim measures. According to its Article 17, the arbitral tribunal may, unless otherwise agreed by the parties, order a party to take any interim *measure of protection* that the arbitral tribunal considers *necessary in the case at hand;* it may also require (a party requesting an interim measure) to provide appropriate security in connection with such measures. Interim measures may also be granted by an arbitration institution (before formation of the arbitral tribunal) or even by a competent state court.[2] [3]

THE CONDUCTING OF ARBITRAL PROCEEDINGS

The arbitral tribunal is to be conducted, under Article 18 of the Arbitration Law, on the principles of independence and impartiality of the arbitrators and dispositiveness as well as competition and equal treatment of the parties. Subject to the mandatory provisions of the Law, the parties may agree, in accordance with Article 19 of the Arbitration Law, on the procedure to be followed by the arbitral tribunal. In default of such an agreement, the arbitral tribunal may, unless otherwise provided for by the Law, conduct the arbitration in such manner as it considers appropriate, including its power to determine the admissibility, relevance, and significance of any evidence.

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[1] Furthermore, the rules on waiver of the right to object in Article 4 of the Arbitration Law provide that, if a party who knows that any dispositive provision of the law or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his/her objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, is to be deemed to have waived his/her right to object.

[2] The references to a competent court in the Arbitration Law generally stand for the references to the arbitrazh court in whose jurisdiction the case would lie otherwise (if not *dealt with in the arbitral* proceedings).

[3] Arbitration Law, Article 9.

The default provisions of the Arbitration Law on conducting arbitral proceedings include, furthermore, the rules[1] on the place[2] and language[3] of arbitration, *confidentiality*[4] and commencement of arbitral proceedings,[5] statements of claim and defense[6] and arbitration costs,[7] presentation of evidence[8] and hearings and written proceedings,[9] as well as failure of a party to present documents or to appear,[10] experts appointed by the arbitral tribunal,[11] and, finally, the rules on court assistance in taking evidence[12] applicable to the proceedings of permanent arbitration institutions.

According to the provisions of the Arbitration Law on commencement of arbitral proceedings,[13] the arbitration with respect to a particular dispute is regarded as commenced, unless otherwise agreed by the parties, on the date on which the statement of claim is received by the respondent. Unless otherwise agreed by the parties, the claimant submits his/her *demands in the statement* of claim in written form to the respondent and (if applicable) to the permanently functioning arbitral institution.[14] Unless otherwise agreed by the parties, *the statement* of claim must indicate, among other things:

- the demands of the claimant;
- the facts on which his claim is based, and
- the evidence supporting the grounds for the claim.[15]

In turn, the respondent is entitled to submit to the claimant and (if applicable) to the arbitral tribunal:

- his defense to the statement of claim with his/her objections to the claim.[16]

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1 Following, without substantial exceptions, the UNCITRAL Model Law on International Commercial Arbitration.

2 Arbitration Law, Article 20.

3 *Ibid.,* Article 24.

4 *Ibid.,* Article 21.

5 *Ibid.,* Article 23.

6 *Ibid.,* Article 25.

7 *Ibid.,* Article 22.

8 *Ibid.,* Article 26.

9 *Ibid.,* Article 27.

10 *Ibid.,* Article 28.

11 *Ibid.,* Article 29.

12 *Ibid.,* Article 30.

13 *Ibid.,* Article 23.

14 *Ibid.,* Article 25.1.

15 *Ibid.,* Article 25.2.

16 *Ibid.,* Article 25.4.
Ibid., Article 25.2.

– Unless the term for submission of the defense is determined by the arbitration rules or by the arbitral tribunal, the defense must be submitted before the first hearing of the arbitral tribunal.[1]

Unless otherwise agreed by the parties, a party is entitled to amend or supplement his/her claim or defense as well as submit additional evidence during the course of the arbitral proceedings, unless the arbitral tribunal refuses to take the amended claim or defense or additional evidence having regard to the delay in presenting them.[2]

According to the provisions on presentation of evidence of the Arbitration Law,[3] each party is obliged to prove the circumstances to which he/she refers as a ground *for his/her demands and objections. If the evidence is regarded as insufficient, the arbitral court may demand additional evidence.* With respect to arbitral tribunals administered by a permanent arbitration institution, the arbitral tribunal or a party with the approval of the arbitral tribunal may, as mentioned above, request from a competent state court[4] assistance in taking evidence.[5] Subject to any contrary agreement by the parties, the arbitral tribunal decides, according to Article 27 of the Arbitration Law, whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings ought to be conducted on the basis of documents and other materials. However, the arbitral tribunal must hold hearings at an appropriate stage of the proceedings at the request of a party, unless the parties have expressly agreed not to hold hearings. Unless otherwise agreed by the parties, the default of a party in the arbitral proceedings does not prevent, under Article 28 of the of the Arbitration Law, the continuation of the proceedings, whereas the failure of the respondent to submit his/her statement of defense is not to be considered as an admission of the claim.

THE MAKING OF THE AWARD AND TERMINATION OF PROCEEDINGS

In the making of the award, under the rules applicable to the substance of dispute of the Arbitration Law,[6] the arbitral tribunal decides the dispute in accordance with the norms of Russian law. But if the parties should choose, in accordance with the Russian law, a foreign law to be applicable to their relations, the dispute is to be decided in accordance with such rules of law as are chosen by the parties as applicable to the

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1 *Ibid.,* Article 25.5.

2 *Ibid.,* Article 25.6.

3 *Ibid.,* Article 26.

4 The references to a competent court in the Arbitration Law generally stand for the references to the arbitrazh court in whose jurisdiction the case would lie otherwise (if not *dealt with in the arbitral* proceedings).

5 Arbitration Law, Article 30.

6 *Ibid.,* Article 31.

substance of the dispute. Failing such a designation, the arbitral tribunal applies the law determined by the conflict of laws rules which it considers applicable. In addition, any designation of the law or legal system of a given state must be construed as referring directly to the substantive law of that state and not to its conflict of laws rules. Moreover, the arbitral tribunal makes its decisions in accordance with the terms of the contract, taking into account the customs to be applied.

An arbitral award is to be made, according to Article 32 of the Arbitration Law, by the arbitral tribunal after considering the circumstances of the case. In arbitral proceedings that are executed by the panel of arbitrators, any decision of the arbitral tribunal must be made, unless otherwise agreed by the parties, by a majority of the arbitrators. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all other arbitrators.

The arbitral award is to be made, according to Article 34 of the Arbitration Law, in writing and must be signed by the arbitrator or arbitrators, including the arbitrator who has the dissenting opinion; the dissenting opinion must be attached to the award. In arbitral proceedings that are executed by the panel of arbitrators, the signatures of the majority of all members of the arbitral tribunal is to suffice, provided that the reasons for omitted signatures are stated. The arbitral award is to indicate, unless otherwise agreed by the parties:

- the place where and the day on which it is made;
- the composition of the arbitral tribunal and *the order of its* formation;
- the names and sites of the *parties of the arbitral* proceedings;
- the grounds for the jurisdiction of the arbitral tribunal;
- the claim and the defense as well as the requests of the parties;
- the circumstances of the case established by the arbitral tribunal, the evidence on which the conclusion of the arbitral tribunal about these circumstances are based as well as the legal norms on which the arbitral tribunal relied in adopting its decision. The arbitral award is also to include
- *the summary part that contains the conclusions of the* arbitral tribunal on the approval or rejection of each of the presented claims.[1]

The arbitral proceedings are terminated, in accordance with Article 36 of the Arbitration Law, by the award by the arbitral tribunal or by its order for the termination of the arbitral proceedings in the event that:

- the claimant withdraws his claim, unless the respondent presents his/her objections against the termination of the arbitration and the arbitral tribunal recognizes his/her legitimate interest in obtaining a final settlement of the dispute;
- the parties agree on the termination of the arbitration;

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[1] *The summary part of the* arbitral award includes the ruling on the arbitration fees and costs, and, if necessary, may contain the provisions on the execution of the arbitral award.

– the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible, including the case when there exists a decision of a court of general jurisdiction, of an arbitrazh court or of an arbitral tribunal, adopted on the dispute between the same persons, on the same object and on the same grounds.

The norms of the Arbitration Law regulating the making of the award and termination of proceedings[1] contain, furthermore, provisions on correction and interpretation of the award, an additional award, and resumption of the arbitral proceedings.[2]

According to the provisions on correction and interpretation of the award by the Arbitration Law, a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature. However, such a request ought to be presented within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties. Furthermore, if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of any point or part of the award. If the arbitral tribunal considers the request to be justified, it must, within thirty days of receipt of the request, make the correction[3] or give the interpretation, and they form part of the award.

Also, an additional award can be made by the arbitral tribunal, unless otherwise agreed by the parties, on request of a party, with notice to the other party within thirty days of receipt of the award. Such an award may concern claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it must make the additional award within sixty days.[4]

According to the provisions on resumption of arbitral proceedings, which are contained in Article 37.6 of the Arbitration Law, in the event that a competent state court,[5] considering the application for cancellation or execution of the arbitral award, suspends the proceedings *in order to give the arbitral tribunal* an opportunity to resume the arbitral proceedings and eliminate the grounds for cancellation or refusal of compulsory execution of the arbitral award, *the arbitral tribunal may, upon request of any party, resume the proceedings.*

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1 Arbitration Law, Chapter 6.

2 Arbitration Law, Article 37.

3 The arbitral tribunal may *also, on its own initiative*, make the correction within thirty days of the date of the award (Article 37.3).

4 Arbitration Law, Article 37.4.

5 The references to a competent court in the Arbitration Law generally stand for the references to the arbitrazh court in whose jurisdiction the case would lie otherwise (if not *dealt with in the arbitral* proceedings).

AMICABLE PROCEEDINGS[1]

Amicable proceedings fall, to some extent, under the scope of the Arbitration Law. This encompasses the rules concerning settlement as well as the rules related to mediation

Settlement[2] is subject to the provisions of the Arbitration Law in its Article 33. According to this article, if, during the arbitral proceedings, the parties resolve the dispute, the arbitral tribunal terminates the proceedings and, upon request of the parties and in default of its own objections, records the settlement in the form of an arbitral award on agreed terms. Such an award must correspond to the general requirements on the making of arbitral awards, which concern the rules applicable to the substance of the dispute in Article 31 of the Arbitration Law presented above. The dispute ought to be decided in accordance with Russian law, including, if necessary, international private law norms, and also in accordance with the terms of the contract taking into account the customs to be applied. The arbitral award based on settlement must contain the statement of being the arbitral award that has the same status and force as any other arbitral award on the merits of the case.

According to the rules on the application of mediation proceedings to a dispute subjected to arbitrazh proceedings, provided in Article 49 of the Arbitration Law, the application of mediation proceedings is allowed at any stage of the arbitral proceedings.

In the event that the parties have decided to turn to mediation proceedings, any one of them is entitled to submit to the arbitral tribunal the application for mediation, attached with the agreement to mediate concluded in written form and corresponding to the requirement provided for by the Law on Alternative Proceedings of Dispute Resolution with Participation of a Mediator (Mediation Proceedings) of 2010.[3] [4] According to Article 8 of the Law, the agreement must indicate:

- the subject of the dispute,
- the mediator(s) or the organization providing mediation services,
- the mediation procedure,
- the cost-sharing between the parties, and
- the term of the execution of the proceedings.

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[1] Amicable proceedings (примирительные процедуры) represent *means of alternative* dispute resolution. They are alternatives to judicial proceedings, which are based on voluntary expressions of the will of the parties to the dispute and aimed at achieving a solution that is satisfactory to them. Russian civil procedural law and legal doctrine are familiar, particularly, with such *means of alternative* dispute resolution as negotiation (переговоры), reconciliation (сверка расчетов), mediation (медиация), and judicial settlement (судебное примирение) as well as amicable settlement (мировое соглашение). *See,* e.g., the Concept of a Single Civil Procedure Code of 2014. http://www.consultant.ru/document/cons_doc_LAW_172071/286c4f987b98907587862bc899c9b1c30c11321d/ (last accessed June 8, 2017).

[2] *Ibid.*

[3] Law no 193-FZ of 24 July 2010. The text in Russian is presented on the website of KonsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_103038/560ab66036fc78930e9138dff12d1bc502fe21fd (last accessed June 13, 2017).

[4] Arbitration Law, Article 49.2.

On the basis of the submitted application, the arbitral tribunal issues the order for mediation.[1] During the term of the mediation proceedings, the arbitral proceedings of the dispute are suspended.[2]

The *mediation agreement, concluded (in writing)* by the parties as the result of the mediation proceedings after the dispute has been submitted to arbitration, could be enforced by the arbitral tribunal upon the request of all the parties as an arbitral award on agreed terms, provided that the above-presented requirement concerning settlement[3] has been followed.

RECOURSE AGAINST THE AWARD

According to Article 230 of the Arbitrazh Procedure Code (amended in 2017), an arbitral award can be challenged by the parties to the proceedings and also by the persons, the rights and duties of whom are subject to the award, as well as by the procurator in defense of rights of the state or a municipal body that have not participated in the proceedings.

Where the arbitration is administered by a permanent arbitral institution, the parties may, however, in the arbitration agreement, directly agree, according to Article 40 of the Arbitration Law, that the arbitral award is final,[4] and such a final decision is irrevocable. In the event that the arbitration agreement does not contain any such provision, the arbitral award may be revoked on the grounds established by the procedural legislation of Russia.

LIABILITY RULES

An arbitral institution is liable, according to Article 50 of the Arbitration Law, only for damages caused by intentional or grossly negligent breach of its duties; the rules of the institution may provide, however, greater liability. An arbitral institution is not liable for the actions of the arbitrator. In turn, an arbitrator is immune from civil liability; however, he is not protected from a civil claim in a criminal proceeding.[5]

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1 *Ibid.,* Article 49.3.

2 *Ibid.,* Article 49.4.

3 *Ibid.,* Article 33.

4 This is different from the UNCITRAL Model Law.

5 The rules of the permanently functioning arbitral institution may provide the possibility of reducing the arbitrator's fees in cases of improper execution of his duties.

RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS[1]
SOURCES OF REGULATING THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD THE BASIC RULES FOR THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

To begin, we outline a few key propositions on which recognition and enforcement of arbitral awards is based. First is **the compulsory character of an arbitration award**. According to paragraph 35 of the Law of the Russian Federation (RF) on International Commercial Arbitration: "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and of Article 36." Thus, the binding nature of the arbitral award for the parties is established by law.

The obligation relating to an arbitral award is based on a contract of the parties means, in particular, the finality (*res judicata*) of its findings: (a) on established facts; (b) on the relevance, admissibility, reliability, and sufficiency of evidence; and (c) on the legal relations of the parties.

Second is the **voluntariness of the execution of the arbitral award**.[2] According to the general correct decision of international commercial arbitration, made both on the territory of Russia and abroad, it is performed voluntarily. The basis of this rule is an arbitration agreement in which all the basic conditions for resolving a dispute by arbitration are agreed, including its subsequent mandatory execution by the relevant party to the agreement against whom the decision will be made.

Third is **the right of the party, in which an arbitral award was made**. This is based on the principles of assistance and control by the state in respect of arbitration. Therefore, in the event of a debtor's refusal to voluntarily fulfill the obligation, the recoverer acquires the right to execute an arbitral award, which by virtue of its specifics as private executive bodies[3] is possible only after confirmation of their legal force of litigation.

Fourth are the **limited procedures for judicial control over the content of arbitral awards in the framework of the judicial process for recognizing and enforcing it**. This is due to the fact that the fundamental principle of the organization and operation

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[1] In connection with the coincidence of the key provisions of § 2 Chapter 30 of the Commercial Procedure Code of the Russian Federation and Chapter 47 of the Civil Procedure Code of the Russian Federation, Chapter 31 of the Commercial Procedure Code of the Russian Federation and Chapter 45 of the Civil Procedure Code of the Russian Federation regarding the rules for recognition and enforcement of arbitral awards which are mainly based on arbitration procedural legislation.

[2] O. Yu. Skvortsov singles out, as an independent principle, the voluntary implementation of the decision adopted by the arbitration court. *See*: Skvorcov O.Ju. Arbitration on issues of business cases in Russia: problems, trends, perspectives. M. 2005. pp. 516–18.

[3] In this connection the concept of private procedural law, founded by G.V. Sevastyanov, deserves attention. *See*: Sevast'janov G.V. Legal nature of arbitration and competence of the arbitration court in the sphere of cases about immovable property. Thesis Diss. Candidate in Legal Science, SPb, 2013. pp. 14, 15.

of international commercial arbitration is its relative autonomy from state justice. Intervention at all stages of arbitration is possible only in exceptional cases and in a manner directly above the law applicable to arbitration. This understanding of the relationship between international commercial arbitration and state courts is guided by the rule of Article 5 of the Law of the RF on International Commercial Arbitration: "In matters governed by the present Law, no court shall intervene except where so provided in the present Law."

Repeated examination of the merits of the case already resolved by international commercial arbitration within the framework of proceedings in state courts is unacceptable. The state court does not reassess the evidence examined in the course of arbitration, and does not verify the validity of the final conclusions of the arbitral tribunal. The ban on the review of the merits of international commercial arbitration is the basis of their legal force and, as such, is generally accepted in both modern doctrine[1] and uniform judicial practice that was established before the creation of a single Supreme Court of the Russian Federation and was confirmed after its creation.

There are a number of procedural laws which restrict the range of evidentiary materials. In particular, there are Article 23 of the Commercial Procedure Code of the Russian Federation and Article 35 of the Law of the RF on International Commercial Arbitration, which establish an exhaustive list of documents attached to the application for the execution of the execution.

The main sources of legal regulation. The order of production for giving executive power to arbitral awards in general is under international and Russian laws. The specific range of sources depends on whether an arbitration award is concerned–accepted in regard to the territory of the Russian Federation or taken on the territory of a foreign state.

Recognition and enforcement of foreign arbitral awards.

Here the main sources are:

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (New York, 10 June 1958)
- Law of the RF on International Commercial Arbitration
- Chapter 31 of the Commercial Procedure Code or Chapter 47 of the Civil Procedure Code

Recognition and enforcement of arbitral awards passed on the territory of the Russian Federation.

Here the main sources are:

- Law of the RF on International Commercial Arbitration.

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[1] *See*: Kurochkin S.A. State courts in arbitration proceeding and international commercial arbitration M. Volters Kluver. 2008. pp.105–07; Krohalev S.V. Category of public order in international civil procedure. Publishing house of the Saint Petersburg State University. 2006. pp. 328–32; Karabel'nikov B.R. Enforcement and contestation of international arbitral awards. Commentary to New York Convention of 1958 and Parts 30, 31 of the Arbitration Procedure Code of the RF (3rd issue). Statut. 2008. p. 382; Commentary to the Arbitration Procedure Code of the Russian Federation (by articles) // Ed. V.V. Jarkov. 3rd issue. M. Infotropik Media. 2011. p. 856 (author - V.V. Jarkov).

- The law on arbitration in the part applicable to international commercial arbitration (according to the rule of Part 2 of Article 1)
- Chapter 30 of the Commercial Procedure Code of the (paragraph 2) or Chapter 45 of the Civil Procedure Code.

An important issue is the ratio of all the listed legal acts to each other and to the Law on Arbitration, since they contain a regulation similar in general to basic principles, while differing in the presentation of individual provisions and the degree of detail of individual rules.

The key for our analysis is the rule of Part 5 of Article 239 of the Commercial Procedure Code, according to which: "The arbitration court may refuse to issue the writ of execution for the enforcement of decisions of international commercial arbitration on the grounds provided for by the international treaty of the Russian Federation and the federal law on international commercial arbitration."

It follows from this rule that, with respect to arbitration decisions taken in the territory of the Russian Federation, the grounds for refusal to issue the writ of execution set out in Article 36 of the Law of the RF on International Commercial Arbitration are applied. For foreign arbitral awards, only the grounds for refusal are applicable, provided for in Article V of the New York Convention. Grounds for refusal under Article 239 of the Commercial Procedure Code are applicable only to decisions of the arbitral tribunal formed and a decision rendered in accordance with the Law on Arbitration.

In the rest of this part, the ratio of sources of legal regulation is as follows. The Law of the RF on International Commercial Arbitration does not contain detailed procedural rules on the procedure for recognizing and enforcing arbitral awards. As stated in clause 1 of Article 35 of the Law, the arbitral award, irrespective of the country in which it was pronounced, is filed with the competent court, as well as with provisions of procedural law. Thus, the Law refers to the Commercial Procedure Code and the Civil Procedure Code.

According to Part 1 of Article 266 of the Commercial Procedure Code, the rules of § 2 of Chapter 30 of the Commercial Procedure Code apply when the arbitration court considers applications for the issuance of writ of execution for the enforcement of decisions of arbitral tribunals and international commercial arbitration (the arbitral tribunal) adopted in the territory of the Russian Federation. Parts 1 and 2 of Article 1 of the Law on Arbitration explicitly state that this federal law regulates the procedure for the formation and activities of arbitration courts and permanent arbitration institutions in the territory of the Russian Federation, as well as arbitration (arbitral tribunal). Only the provisions of Articles 39 and 43, Chapters 9–12 of the Arbitration Law apply to the organization, not only of arbitration of internal disputes, but also of international commercial arbitration, the place of which is the Russian Federation.

Therefore, in determining the relationship between the federal laws listed in relation to international commercial arbitration, the place of which is Russia, one should first of all proceed from the norms of the Law of the RF on International Commercial Arbitration, and after it, the Commercial Procedure Code, referring to those provisions that are not

explicitly reflected in the Law of the RF on International Commercial Arbitration and therefore can be used completely independently. This refers to the procedural norms of § 2 of Chapter 30 of the Commercial Procedure Code and Chapter 47 of the Civil Procedure Code, which regulate the procedure for judicial proceedings (for example, the rules on the jurisdiction of such applications, the possibility of filing an application by filling out a form posted on the official site of the arbitration court in the information and telecommunication system "Internet", timing of consideration and other procedural norms). In the same way, separate rules of this law apply to international commercial arbitration on the basis of Part 2 of Article 1 of the Arbitration Law.

In this case, the identification of the arbitration court acting on the basis of the Arbitration Law and international commercial arbitration will be unacceptable, since these private enforcement institutions, in spite of their common roots, have a number of significant differences among themselves, as noted by a number of specialists.[1]

The same can be said about the correlation of all the above normative acts with respect to foreign arbitral awards – the priority is the New York Convention of 1958. The law on the Law of the RF on International Commercial Arbitration and the Commercial Procedure Code have additional significance and are applied under the part in which they complement its procedural provisions. Moreover, an understanding of a number of provisions of the 1958 New York Convention, for example, paragraph 2 of Article V, is possible only on the basis of a sufficiently large body of Russian legislation. For example, in order to correctly interpret such grounds for refusing to recognize a foreign arbitral award as "the object of the dispute cannot be the subject of arbitration proceedings under the laws of that country", it is necessary to understand the difference between civil and legal disputes and between private and public law in the legal system of Russia, since, as a general rule, public law disputes are not arbitrable and cannot be the subject of arbitration proceedings.

The same is true with regard to such grounds for refusal as "the recognition and enforcement of this decision are contrary to the public order of this country". The concept of public policy, with general principles of its understanding and application for a number of provisions, is national in nature and is based on the legal system of the state.

It should be borne in mind that the Civil Procedure Code and the Commercial Procedure Code and the New York Convention of 1958 do not apply to the implementation of decisions of specific bodies established in the framework of certain international organizations and having a special legal status in this regard, for example,

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[1] *See*: Skvorcov O.Ju. Commentary to Federal Law "On arbitration courts in Russian Federation" (science-practical). M. 2003. p. 34; Boguslavskij M.M. International private law. 5-e izdanie. M. Jurist. 2004. p. 552; Zvekov V.P. International private law. M. Jurist. 2004. p. 591; Commentary to the Arbitration Procedure Code of the Russian Federation (by articles). Ed. V.V.Jarkov. 2-e izdanie. M. Volters Kluver. 2004. pp. 508, 509 (author - V.V. Jarkov); International commercial arbitration. Commentary on legislation. Science-practical commentary to Law of the RF "On international commercial arbitration" (by articles). Ed. A.S. Komarov, S.N. Lebedev, V.A. Musin. SPb, 2007. p. 149 (author - V.V. Jarkov); Kotel'nikov A.G. Legal nature of arbitration agreement and effect of its conclusion. Thesis Diss. Candidate in Legal Science, Ekaterinburg, 2008. pp.11–14.

within the framework of the WTO.[1] Therefore, here, the order of execution of such arbitration bodies is not considered.

The choice of proper judicial proceedings (§ 2 of Chapter 30 of the Commercial Procedure Code or Chapter 31 of the Commercial Procedure Code). Proceeding from the foregoing, the procedures for making the executive force different depending on the place of award are regulated, as already noted, by various sources. Firstly, with respect to decisions of international commercial arbitrations adopted in the territory of the Russian Federation, the rules of § 2 of Chapter 30 of the Commercial Procedure Code "Proceedings on cases on the … [issuance] of an enforcement order for the enforcement of an arbitral award" and the Law on the Law of the RF on International Commercial Arbitration apply. Secondly, with respect to decisions of international commercial arbitrations rendered abroad, the rules of Chapter 31 of the agrarian and industrial complex of the Russian Federation and the New York Convention of 1958 are applied.

Thus, the choice of the procedure for giving executive power to an arbitral award is not connected with the place of its formation, but with the place of its decision-making. As noted by experts, the place of arbitration and the venue of the arbitration meeting are not the same.[2] Therefore, the main significance for determining the possibility of choosing a procedure is the adoption of an arbitral award by the arbitral tribunal – the territory of Russia.

Attention should be drawn to the fundamental difference in the rules for giving executive power to "internal" and foreign arbitral awards, which are determined on the basis of the legal regime applied to the relevant relations. In particular, arbitral awards rendered in the territory of Russia are executed in the manner prescribed by the Law of the RF on International Commercial Arbitration and § 2 of Chapter 30 of the Commercial Procedure Code without special additional conditions.

In the case of foreign arbitral awards, additional conditions arising from the protection of the national legal space and conditioned by the requirements of Article 6 of the Federal Constitutional Law "On the Judicial System of the Russian Federation"[3] and the Commercial Procedure Code are applied. In particular, according to Part 1 of Article 241 of the Commercial Procedure Code, the decisions of arbitration courts and international commercial arbitration that they have accepted in the territories of foreign states on disputes and other cases arising in the course of carrying out entrepreneurial and other economic activities (foreign arbitral awards) are recognized and enforced in the Russian Federation by arbitration courts, if recognition and enforcement of such decisions is provided for by an international treaty of the Russian Federation and federal law.

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1 *See*: Trunk-Fedorova M.P. Settlement of disputes within the World Trade Organization. SPb, 2005.

2 *See*: Hvalej V., Frolova O. International arbitration: some approaches of Russian courts // Collegium. 2002. № 6. p. 23.

3 According to Part 3 of Article 6, "Compulsory orders on the territory of the Russian Federation of judgments of foreign courts, international courts and arbitration shall be determined by international treaties of the Russian Federation."

Thus, **it is necessary to have a multilateral or bilateral international treaty**, the absence of which leads, as a general rule, to the impossibility of executing a foreign arbitral award. With regard to the decisions of international commercial arbitration, the universal convention is based on the New York Convention of 1958, through which arbitration is a universal way of resolving civil disputes on the planet. In addition, a number of bilateral treaties can be applied, for example, with Algeria, Iraq, and Yemen. Therefore, the question of priority in all cases of the New York Convention of 1958 for resolving issues of recognition and enforcement of foreign arbitral awards is not entirely uncontested. For example, A.I. Muranov considered this issue in relation to the Agreement with Sweden in 1940 and drew attention to the problematic issues of the relationship between bilateral and multilateral treaties between Russia and Sweden.[1]

In addition, it is possible to execute a foreign arbitration award on the basis of reciprocity, when, in the absence of a special bilateral or multilateral treaty, such a decision will be executed provided that it meets certain requirements and that the procedure for obtaining permission for execution is complied with. In the Russian legislation there is such a basis for reciprocity in respect of decisions of foreign arbitration. It was reflected in the statement of the USSR upon ratification of the 1958 New York Convention. In particular, it was stated that "The USSR will apply the provisions of this Convention with respect to arbitral awards rendered on the territory of states not party to the Convention only on conditions of reciprocity."[2] Therefore, in our opinion, Boris Karabelnikov makes the correct conclusion that in Russia, arbitral awards issued in Russia can be recognized and enforced in countries that are not parties to the 1958 New York Convention. One such precedent took place in 1966, when the decision of the VTAC at the CCI of the USSR was recognized and executed in the territory of Ghana, which then did not participate in the Convention.[3]

The object of two productions are arbitration awards. Therefore, the definition of arbitration on the approval of a settlement agreement cannot be the object of recognition and enforcement. In this case, to protect the interests of the parties, and if the parties to the arbitration proceedings conclude an amicable agreement, it should be included in the content of the arbitral award. The definition of arbitration to approve a settlement agreement, unlike a similar definition of a state court, cannot be enforced in Russia, since Russian law provides for the possibility of issuing an enforcement order only in respect of decisions of international commercial arbitration.

In this case, the object of production under the procedure of Chapter 31 of the Commercial Procedure Code cannot be the decision of the foreign arbitration court

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1 *See*: Muranov A.I. New approach for issues of enforcement of arbitral awards from Sweden in Russia: problems of use almost forgotten bilateral agreement of 1940 // *Herald of international commercial arbitration*. 2010. № 2. pp. 61–102.

2 *See*: Lebedev S.N. International trade arbitration. M. International relations. 1965. pp. 191, 192.

3 *See*: Karabel'nikov B.R. Recognition and enforcement of foreign arbitral awards. Science-practical commentary to New York Convention of 1958. M., Justicinform. 2001. pp. 22, 23.

to compel the advance on arbitration expenses, and the interest accrued beyond the reference rate is terminated, since the execution of intermediate foreign arbitral awards by the provisions of international treaties and the norms of the Commercial Procedure Code is allowed.

The use of more favorable regulation when enforcing a foreign arbitral award (Article VII of the New York Convention of 1958). According to clause 1 of Article VII of the New York Convention of 1958, the provisions of this Convention do not affect the validity of multilateral or bilateral agreements with respect to the recognition and enforcement of arbitral awards concluded by the Contracting States and do not deprive any interested party of the right to avail of any arbitration award in order and to the extent permitted by law or international treaties of the country where recognition is requested and enforcement of such arbitration solutions. In such cases, a party interested in the enforcement of an arbitral award may, at its option, avail either the 1958 New York Convention, or a bilateral treaty, or more beneficial local legislation, for the purpose of enforcing it.[1]

THE PROCEDURE FOR THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

Subjects appeal to the arbitration court. The right to appeal to the arbitration court with an application for the issuance of a writ of execution for the decision of the Russian arbitration or for the recognition and enforcement of a foreign arbitral award shall be vested in the person in whose favor the arbitration award is issued. Such a person may be both the claimant in case of satisfaction of the claim, and the respondent in case of refusal to the plaintiff in the suit, for example, to recover the costs associated with the arbitration proceedings, as well as the persons who obtained the rights based on the arbitral award, in the order of procedural and material succession.

The right to apply to the competent court is entitled to the person in whose favor the award was made, or to another person to whom the relevant rights have been transferred. This is evidenced by sufficiently broad language of relevant laws and international treaties. Thus, in paragraph 2 of Article 35 of the Law of the RF on International Commercial Arbitration, "a Party based on an arbitral award or requesting to enforce it" is indicated as such. Part 1 of Article IV of the 1958 New York Convention states that "the party seeking recognition and enforcement" is referred to the competent court for obtaining the recognition and enforcement referred to in Article III. Here, only the person in whose favor the arbitral award is rendered is not indicated, which also allows for interpretation in favor of the fact that the arbitrator's successor may apply with such a statement.

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[1] *See*: Karabel'nikov B.R. Enforcement and contestation of international arbitral awards. Commentary to New York Convention of 1958 and Parts 30, 31 of the Arbitration Procedure Code of the RF (3rd issue). M. Statut. 2008. p. 205.

Determination of the proper subject for applying to the arbitration court upon legal succession. In order to substantiate the admissibility of the assignment of rights of claims on an arbitral award before applying to the competent court with a declaration of recognition and its enforcement, it is necessary to analyze the place of the rules on succession in the system of arbitration procedural and civil procedural legislation, from the point of view of the correlation between general rules and special institutions of arbitration procedural and civil procedural law, as well as the ratio of legal succession in material civil and procedural law.

A cession of a claim within the framework of procedural relations is a transfer of the rights of one person to another person on the grounds provided for by substantive law. The grounds for procedural succession are specified in Article 48 of the Commercial Procedure Code (and Article 44 of the Civil Procedure Code), according to which, in the event of the withdrawal of one of the parties in a legal or legal relationship arising from a reorganization of a legal entity, assignment of a claim, transfer of a debt, death of a person and in other cases, the change of persons shall be done by the arbitral tribunal, indicating this in a judicial act.

Succession is based on legal facts of civil law and reflects the relationship of material and arbitration procedural law. In each specific case, it is necessary to analyze the relevant factual circumstances provided for by civil law, in particular, in ceding the claim, the norms of Chapter 24 of the Civil Code to resolve the issues of the possibility of succession to the arbitral tribunal and the persons participating in the case. Thus, the succession in the arbitration process is based on succession in civil law. Succession in accordance with Part 1 of Article 48 of the Commercial Procedure Code is possible at any stage of the commercial process, both in the court of first instance, and in the appellate, cassation, supervisory proceedings, and in enforcement proceedings.

Thus, it is important to emphasize the conditionality of succession in procedural law by succession in substantive law, since the former arises on the basis of circumstances of a substantive nature, helping and facilitating the exercise and protection of material rights.

At the same time, it should be noted that the rules on succession (Article 48 of the Commercial Procedure Code) are placed in the general part of the Commercial Procedure Code, "Section I, General Provisions", which contains rules applied in all stages of the commercial process and its individual proceedings of a special part, except for those specified in the relevant chapters of the Commercial Procedure Code of its special part. Therefore, it is not by chance that the rules of Chapters 30 and 31 of the Commercial Procedure Code are placed in its Section IV "Special Rules for Proceedings in Certain Categories of Cases in Commercial Courts". This indicates that the rules on general provisions of the agrarian and industrial complex of the Russian Federation, passed in Section I of the Commercial Procedure Code, are applicable here.

According to the new version of Article 11.11 of the Law of the RF on International Commercial Arbitration, "When a person changes in an obligation in respect of which

an arbitration agreement is concluded, the arbitration agreement is effective against both the original and the new creditor, as well as the original and the new debtor." We believe that this rule applies not only to the succession in arbitration in the consideration of a particular case, but also to other situations, in particular, during the issuance of the arbitral award and the determination of the state arbitration court in accordance with Articles 240 and 245 of the Commercial Procedure Code, since the possibility and legitimacy of this action flows from both Chapter 24 of the Civil Code and Article 48 of the Commercial Procedure Code .

First of all, the norms of Article 48 of the Commercial Procedure Code, as already indicated, belong to the general part of the Commercial Procedure Code and are accordingly applied in all types of productions, and therefore their textual duplication in the chapters of a special part of the Commercial Procedure Code is excluded. Consequently, although Part 1 of Article 242 of the Commercial Procedure Code provides that the application for recognition and enforcement of a foreign arbitral award is submitted by the party to the dispute in favor of which the decision was taken, this does not mean that this party cannot be replaced after the decision of the international commercial arbitration. The arbitration court, accepting the application for recognition and enforcement of a foreign arbitral award submitted in accordance with the procedure of Chapter 31 of the Commercial Procedure Code, is entitled to resolve the issue of succession in accordance with Article 48 of the Commercial Procedure Code, since this article is applied here as being of a general nature and relating to all categories of cases that are subordinate to commercial courts. It is unlikely that this interpretation of this issue will be correct, which will not allow for the succession of an arbitral award after it was handed down, since the purpose of succession in the arbitration process, including in the cases of Chapter 31 of the Commercial Procedure Code, is the provision of procedural and jurisdictional conditions for the protection of the material rights of participants in civil turnover.

Succession on the side of the executive creditor is possible if the application for recognizing and enforcing a foreign arbitral award is enforced at the stage of enforcement proceedings in the course of its enforcement by the Federal Service of bailiffs, as follows from Article 48 of the Code of Administrative Procedure[1] and Article 52 of the Federal Law "On Enforcement Proceedings" and was confirmed by judicial practice.

The initiating of proceedings for the enforcement of the decision of international commercial arbitration. A recourse to the arbitration court is connected with observance of certain procedural requirements, which are contained mainly in the Commercial Procedure Code and also depending on the type of decision – "domestic" or foreign – in the Law of the RF on International Commercial Arbitration and the New York Convention of 1958.

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[1] Commentary to the Commercial Procedure Code of the Russian Federation. Ed. V.F. Yakovlev and M.K. Yukov. M. Gorodets. 2003. p. 157.

The question arises: Can the decision of foreign arbitration be recognized and enforced in the territory of Russia if it was refused in another state? When answering this question, it can be noted that the refusal to recognize and enforce a foreign arbitration award in the territory of one state should not be regarded as an obstacle to the initiation of the same proceedings for recognition in another state if the debtor has property in the territories of several states. The judicial power of one state is limited by its territorial boundaries. Therefore, the legal force of a judicial act refusing to execute a foreign arbitration award by State A in the territory of State B does not apply to other states, in particular to Russia. Accordingly, the recoverer may, in the presence of the debtor's property in the territories of other states, be able to try and declare a petition for recognition and enforcement of the court decision of State A in these countries, naturally, with observance of all legal prerequisites. This is the advantage of the New York Convention of 1958, because the arbitral award can be executed on the territory of any of its member states, regardless of the fate of the decision in a particular state.

Jurisdiction

Commercial courts have the right to consider, in accordance with Article 32, Part 2 of Article 266, and Part 1 of Article 241 of the Commercial Procedure Code, only those statements on giving executive power to arbitral awards that relate to decisions on disputes from civil relations in the performance of entrepreneurial and other economic activities. Other applications for other categories of decisions are submitted to the courts of general jurisdiction.

Since the principal number of arbitral awards is made on disputes arising from entrepreneurial and other economic activities, accordingly, the main attention will be paid to the recognition and enforcement of arbitral awards in accordance with the rules of § 2 of Chapter 30 and Chapter 31 of the Commercial Procedure Code.

Suitability

In accordance with Part 3 of Article 236 of the Commercial Procedure Code of the Russian Federation, an Application for the Issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award is filed with the commercial court of the constituent unit of the Russian Federation at the debtor's location or place of residence or, if the location or place of residence is unknown, at the location of the property of the debtor, who is a party to arbitration proceedings.

In addition, in this category of cases, contractual jurisdiction is permissible. In particular, by agreement of the parties to the arbitral proceedings, an application for the issuance of a writ of execution for the enforcement of a decision of an arbitral tribunal may be submitted to an arbitration court of a constituent entity of the Russian Federation in whose territory a decision of an arbitral tribunal was adopted, or to an

arbitration court of a constituent entity of the Russian Federation at the location of the party to the arbitral proceedings, in favor of which the decision of the arbitral tribunal was adopted. We believe that such an agreement can be one of the elements of the arbitration agreement in general, concluded in accordance with Article 7 of the Law of the RF on International Commercial Arbitration, and can be concluded as a separate procedural agreement on the rules of Article 37 of the Code of Administrative Procedure and Article 32 of the Civil Procedure Code.

The application for recognition and enforcement of foreign arbitral awards shall be submitted by the party in whose favor the decision is taken to the arbitration court of the subject of the Russian Federation at the location or place of residence of the debtor or, if its location or residence is unknown, at the location of the debtor's property (Part 1, Article 242 of the Commercial Procedure Code). Contractual jurisdiction here is not provided by the law, but it can be used by the rules of analogy of the law (Part 5,Article 3 of the Commercial Procedure Code).

The timeframe for submitting an application to the competent court for the issuance of an enforcement order for the enforcement of an arbitral award is not directly defined in the Law of the RF on International Commercial Arbitration and Chapters 30 and 31 of the Commercial Procedure Code. Therefore, the application is possible after the deadline set for the arbitration decision for voluntary execution. At the same time, the rule of Part 5 of Article 4 of the Commercial Procedure Code on the mandatory pre-trial settlement of the dispute by sending a claim to the other party does not apply to this category of cases. In the Act of the Commercial Court of the Moscow District of July 21, 2016, No. F05-10867/16 in the case No. A40-132970/2016, the following was correctly determined: "The applicant in the case of issuing the writ of execution to the decision of the arbitral tribunal is not required to send a claim to the other party."

With regard to foreign arbitral awards, pursuant to Part 2, Article 246 of the Commercial Procedure Code, it is established that, "A foreign court judgement or a foreign arbitration award may be presented for enforcement within a term not exceeding three years from the day of its entry into force. If this term is missed, it may be restored by the commercial court upon the recoverer's motion in accordance with the rules stipulated in Chapter 10 of this Code." Thus, the applicant must apply for recognition and enforcement of a foreign arbitral award within three years from the date of its entry into force. Then, the deadline for the presentation of the issued writ of execution to the corresponding department of the Federal Service of bailiffs is separately calculated.

As stated in the Decision of the Presidium of the Supreme Commercial Court of the Russian Federation of 09.03.2011 N 13211/09 in the case No. A54-3028/2008:

> Consequently, by virtue of the combined effect of Article 246 and clause 1 of Part 1 of Article 321 of the Commercial Procedure Code of the Russian Federation, recognition and bringing into the execution of a foreign arbitral award in the territory of the Russian Federation shall be carried out within six years: three

years are granted for its voluntary execution or submission to the court for recognition and enforcement, the other three years are granted within the framework of the enforcement proceedings with the execution of the writ for execution.

The requirements for an application for the issuance of a writ of execution or for the recognition and enforcement of a foreign arbitral award for the enforcement of an arbitral award are reflected in Article 237 of the Commercial Procedure Code in relation to domestic arbitral awards and Article 242 of the Commercial Procedure Code as applied to foreign arbitral awards. These rules coincide, since they are largely legal and technical in nature.

An application for the issuance of a writ of execution for the enforcement of an arbitral award shall be submitted in writing and must be signed by the person in whose favor the decision has been taken, or by said person's representative. The statement contains a number of mandatory details in accordance with Articles 237 and 242 of the Code of Administrative Procedure. Their non-compliance is the basis for abandonment without motion (Article 128 of the Commercial Procedure Code) or return to the applicant (Article 129 of the Commercial Procedure Code). The application is accompanied by the necessary documents specified in Part 4 of Article 237 of the Commercial Procedure Code or Part 4 of Article 240 of the Commercial Procedure Code.

With regard to the consideration of applications for the issuance of the writ of execution for the enforcement of an arbitral award or recognition and enforcement of a foreign arbitral award: the application shall be considered by the judge alone within a period not exceeding one month from the day of its receipt by the arbitration court.

When preparing a case for litigation on the petition of the party to the arbitral proceedings, the court may request from the permanent acting arbitration institution or from the body authorized to deposit materials of the arbitration, in accordance with the legislation of the Russian Federation, the materials of the case on which the writ of execution is requested to enforce the decision of the arbitral tribunal, according to the rules stipulated by the Commercial Procedure Code for claiming evidence.

Apparently, the judge has the right, but is not obliged, to demand from the arbitration the materials of the case, on which the writ of execution is requested, according to the rules for claiming evidence. The necessity of demanding the entire case is determined by the nature of the objections of the debtor, which may require the study of a wider range of documents than indicated in Part 4 of Article 237 of the Commercial Procedure Code.

When considering the application under Chapter 31 of the Commercial Procedure Code, the scope of the documents requested is limited to those specified in Part 4 of Article 242 of the Commercial Procedure Code, which corresponds to Article IV of the 1958 New York Convention. This is a matter of presenting a genuine award and a genuine arbitration agreement, or duly certified copies. If another international agreement establishes a different set of documents (for example, in Article 17 of the Treaty on Mutual Legal Assistance between the USSR and Algeria) for application to

the application for execution of the decision, then the rules of the bilateral treaty should be guided.

The parties to the arbitration proceedings are notified by the arbitration court of the time and place of the court session. Failure to attend these by those persons, who were duly notified of the time and place of the hearing, is not an obstacle to the consideration of the case. In considering the case, the arbitration court, during the court session, determines whether there is or is not a reason to issue the writ of execution for the enforcement of the arbitral award provided for in Part 4 of Article 299 of the Commercial Procedure Code, in Article 36 of the Law of the RF on International Commercial Arbitration, which is carried out by examining the evidence submitted to the court, the claims and objections. In the case of foreign arbitral awards, a range of such facts is also determined taking into account the debtor's objections on the basis of Article V of the New York Convention of 1958, or bilateral treaties of the Russian Federation with other countries if they establish the procedure for mutual recognition and enforcement of arbitral awards, for example, with Algeria, Yemen, and Iraq.

Thus, consideration of the application takes place in an adversarial form, since the debtor has the right to give evidence that proves the existence of legal facts specified in relation to "domestic" international commercial arbitrations in Article 36 of the Law of the RF on International Commercial Arbitration, and in relation to foreign arbitral awards – in Article V of the New York Convention of 1958, and the other party has the right to provide evidence in their refutation. In addition, by virtue of *ex officio* powers, the arbitral tribunal is entitled to establish, on its own initiative, the legal facts specified in paragraph 2 of Article V of the New York Convention of 1958.

At the same time, the arbitral tribunal has no right to overestimate the circumstances established by the arbitral tribunal, nor to review the arbitral award on the merits, since it is final. As pointed out by the Presidium of the Supreme Commercial Court in paragraph 20 of Information Letter No. 96, the arbitration court, when considering the application for the issuance of the writ of execution to enforce the decision of the arbitral tribunal, does not overestimate the actual circumstances established by the arbitral tribunal. The court also should not allow re-evaluation of the specific circumstances of the case, or verification of the correctness of the application of material law norms by the arbitral tribunal. In the Decision of the Supreme Commercial Court of 24.05.2010 N VAS-4351/10 on the case No. A21-802 / 2009, it was noted that the arguments of entity that the decision of the international arbitration is based on the incorrect application of substantive law and on inadequate evidence are aimed at reviewing the case in essence and cannot be taken into account by virtue of clause 4 of Article 243 of the Commercial Procedure Code of the Russian Federation and the legal position formulated in paragraph 20 of the Information Letter of the Presidium of the Supreme Commercial Court of December 22, 2005 No. 96.

As regards adoption of interim measures in the period of authorization of an application for recognition and enforcement of an arbitral award: in accordance with

Article VI of the New York Convention of 1958 and Article 36 § 2 of the Law of the RF on International Commercial Arbitration, interim measures can be applied for a period when, in another process, an application was filed before the court to annul or suspend the execution of the award, for example, the decision is challenged.

What is meant by proper security? In what order and for what reasons is the application for adequate security considered and resolved? For example, the arbitral tribunal, in which enforcement of an arbitral award is sought, has postponed its decision. The party who applied for enforcement of the arbitration decision asks the court to oblige the other party to provide adequate security in accordance with paragraph 2 of Article 36 of the Law of the RF on International Commercial Arbitration. The arbitral tribunal considers such petitions in the civil procedure. In accordance with Article 3 of the Commercial Procedure Code, the procedure for judicial proceedings in arbitration courts is determined by the Commercial Procedure Code and other federal laws adopted in accordance therewith. Therefore, under proper security, it is necessary to understand the application of the measures of Chapter 8 of the Commercial Procedure Code "Provisional measures of the arbitration court", since there is no other law.

Can the rules for reviewing motions for securing a claim be fully applicable here? After all, according to the general rules of the Commercial Procedure Code such statements are considered by the judge alone, without calling the parties. We believe that such an order is not applicable here, and such applications should be considered in the court session in the same procedure as the recognition and enforcement of the arbitral award.

Should the person who claims to take interim measures prove that the failure to take such measures will inevitably make it difficult or impossible to enforce the award, or is it sufficient for such person to prove that it is difficult or impossible to enforce the award?

The basis for the procedure for resolving the application for securing the claim is the beginning of speed and efficiency. In our opinion, the definition of interim measures is not made on the basis of reliably established facts indicative of the defendant's dishonest behavior, but on the basis of the high probability of such behavior, which means by analogy with the rules for securing the claim, since international treaties and legislation on international commercial arbitration do not establish a different order. The plaintiff must prove the probability that the defendant may evade execution of the arbitral award during the consideration of the petition for its cancellation, but is not obliged to prove and give evidence that the defendant has already concealed any property or spent money to avoid property liability. These legal facts, established by the court when authorizing an application for interim measures, form the so-called local subject of proof. Unlike the general subject of proof, the local subject of proof is the facts necessary to perform a certain procedural action.[1]

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[1] *See* more about the local subject of proof and its difference from the general subject of proof: Jarkov V.V. Legal facts in civilized procedure. M., 2012. pp. 157–64; Cognition and proof of procedural legal facts // Russian yearbook of civil and arbitration proceedings. 2002-2003. № 2. SPb, Publishing house of the Saint Petersburg State University. 2004. pp. 146–56.

Ñonsolidation of proceedings. According to Part 5 of Article 238 of the Commercial Procedure Code, if an Application for the Issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award and an application for its cancellation are before the same arbitration court, the arbitration court consolidates the specified cases in one production in the order provided by Parts 2.1 and 6 of Article 130 of the Commercial Procedure Code.[1]

According to Part 6 of Article 238 of the Commercial Procedure Code, if an Application for the Issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award and an application for its cancellation are before different arbitration courts, the arbitration court, which is considering the applications that were submitted later, is obliged to suspend the proceedings according to point 1 Part 1, Article 143 of the Commercial Procedure Code until another arbitration court considers one of the specified applications which had been submitted first.

If different arbitration courts are considering an Application for the Issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award and an application for its cancellation, which have been submitted on the same day, the proceedings on a case of the issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award shall be subject to suspension according to rules established by the same part of the Code just mentioned.

With the resumption of proceedings in the case, which have been suspended according to Part 6 of Article 238 of the Commercial Procedure Code, the arbitration court issues a ruling:

1) for the refusal of the issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award in case another arbitration court issues a ruling for the cancellation of this decision.

2) for the termination of proceedings due to the Application for the Issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award according to point 2 Part 1 of Article 150 of the Commercial Procedure Code in case another arbitration court issues a ruling for the refusal in the cancellation of this decision subject to the provisions of point 5 Part 2 of Article 234 of the Code.

3) for the refusal in the cancellation of the decision of the arbitration court in case another arbitration court issues a ruling for the issuance of a writ of execution for the enforcement of the decision.

4) for the termination of proceedings due to the application for the cancellation of the decision of the arbitration court according to point 2 Part 1 of Article 150 of the

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[1] Previously, this rule was fixed in the court practice (item 13 of the Information Letter of the Supreme Commercial Court No. 96: the arbitration court has the right to issue a decision on the merger of cases on applications for cancellation of the decision of the arbitration court and on issuing the writ of execution for compulsory execution of the decision of the arbitral tribunal if the application for the cancellation of the decision and the application for the issuance of the writ of execution were submitted to one arbitration court).

Commercial Procedure Code in case another arbitration court issues a ruling for the refusal in the issuance of a writ of execution for the enforcement of this decision.

Decision of the Commercial Court on the Issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award (Article 240 of the Code) or on the Recognition and Enforcement of Foreign Arbitration Award. (Article 245 of the Code).

On consideration of the application for giving executive force to the arbitral decision, a ruling for the issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award passed in the territory of Russia or a ruling for the Recognition and Enforcement of Foreign Arbitration Award is issued. The ruling is taken out by the rules established in Chapter 20 of the Commercial Procedure Code for decision-making.

The most important part of the ruling is the instruction on the issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award or on the refusal of the issuance of a writ of execution or on the recognition and enforcement of a foreign arbitration award or on the refusal in its recognition and enforcement. Once an application is approved under Chapter 31 of the Commercial Procedure Code , after issuance of the corresponding ruling the very same arbitration court gives to the execution creditor a writ of execution (Part 1 of Article 246 of the Commercial Procedure Code).

The current legislation does not exclude the possibility of the issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award before the expiry of the set term for the filing of the application for the cancellation of this decision, i.e. the established three-month term under Part 3 of Article 230 of the Commercial Procedure Code (item 4 of the Review of Ñases of contest of arbitration court decisions and issuance of Writs of Execution for the Enforcement of an Arbitration Tribunal Awards).

According to item 32 of the Information Letter of the Presidium of the Supreme Ñommercial Court of the Russian Federation No. 96, in the presence of the circumstances which complicate the execution of the arbitration court decision, the arbitration tribunal has the right to delay the execution of the ruling for the issuance of a Writ of Execution for the Enforcement of an Arbitration Tribunal Award. This explanation is applicable also to the Writs of Execution given on the basis of decisions of the international commercial arbitrations.

The arbitration court's ruling on the recognition and execution of a decision of a foreign court or of a foreign arbitrage decision may only be appealed against to the arbitration court of the cassation instance in the course of one month as from the day of the issuance of the ruling.

The enforcement of a Russian or foreign arbitration tribunal award

Obtaining the sanction of an arbitration tribunal for compulsory execution of the arbitral decision is only the first stage of the execution creditor's rights protection. At the second stage, as the execution creditor, he has to initiate executive proceedings,

protecting his interests by legal means provided by the Ñommercial Procedure Code (section VII) and the Law "On enforcement proceedings".

The provision of Article 43 of the Law of the Russian Federation on International Commercial Arbitration must be kept in mind, according to which no arbitral decision, including the arbitral decision which does not demand enforcement, can be the basis for the entering of records into the state register (including the Unified State Register of Legal Entities, the Unified State Register of Private Entrepreneurs, and the Unified State Register of Rights), the register of owners of personalized securities or other registers in the territory of the Russian Federation, the introduction of records which involve the emergence, change or termination of civil rights and duties, in the absence of the writ of execution, given on the basis of the judicial act of the competent court (including concerning the arbitral decision which does not demand enforcement).

According to Part 2 of Article 1 of the Law of the Russian Federation on International Commercial Arbitration, this extends also to decisions of international commercial arbitration which take place is the Russian Federation. We believe that proceeding from the rules of analogy of the law, this provision on the necessity of receiving a writ of execution, and, therefore, passing of the procedure of recognition and enforcement, extends also to foreign arbitral decisions, for example, if the foreign arbitration resolved a corporate dispute demanding modification of the register of securities owners. The different approach would create unjustified advantages for foreign arbitral decisions. In this connection, it would be insufficient to be limited to a procedure of objections under Article 245.1 of the Commercial Procedure Code of the Russian Federation.

THE BASES FOR REFUSAL IN RECOGNITION AND ENFORCEMENT OF THE ARBITRAL DECISION

General provisions. The grounds for refusal in giving executive force to both the Russian and the foreign arbitral decisions to a certain extent are the "core" of this subject, as they define the conditions for action of the arbitral decision.

In this plan, the research and assessment of the legal facts specified in Article 36 of the Law of the Russian Federation on International Commercial Arbitration has the greatest value for the Russian arbitral decisions. Concerning foreign arbitral decisions, the circle of such facts is defined with the objections of the debtor on the basis of the New York Convention of 1958, or bilateral contracts of the Russian Federation with other countries if they establish an order of mutual recognition and execution of arbitral decisions.

According to Part 4 of Article 239 of the Commercial Procedure Code of the Russian Federation, the commercial court may refuse to issue a writ of execution for the enforcement of an award of an international commercial arbitration court on the grounds stipulated in an international treaty of the Russian Federation or in the federal law on international commercial arbitration.

Therefore, as to the solution of the question of the possibility of forcible execution of the decision of an international commercial arbitrage which has been made in Russia, it is necessary to be guided by Article 36 of the Law of the Russian Federation on International Commercial Arbitration, and concerning the arbitral decision which has been made abroad, by the New York Convention of 1958, in the absence of a special bilateral contract on execution of arbitral decisions.

References to the grounds for refusal of the issuance of a writ of execution for enforcement established in Article 239 of the Commercial Procedure Code will not be admissible, as the provisions which are contained there belong only to the arbitration of internal disputes.[1]

Grounds for refusing recognition or enforcement of an arbitral award

Article 36 of the Law of the Russian Federation on International Commercial Arbitration subdivides into two groups the grounds for refusing recognition or enforcement of an arbitral award, grounds which are close in accordance with the bases of Article V of the New York Convention of 1958. The first group covers various procedural legal facts (or the actual contents), the existence or lack of which is the basis for refusal of the recognition and enforcement of the arbitral award. The second group covers such estimated actual circumstances which belong to the substantial party of the arbitration proceeding, and also can form, at their establishment, the basis for refusal of the recognition of the validation of the arbitral decision.

According to Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 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:

(a) The parties to the agreement (Article II of the New York Convention 1958) were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) 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

[1] *See*: Komarov A.S., Karabel'nikov B.R. Practice of the federal arbitration court of the Moscow district on cases about contestation and enforcement of international arbitral awards // International commercial arbitration. 2004. № 4. pp. 11–13.

award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The second group of grounds is connected with the check of both the procedural legal facts, and the merits of the dispute. In particular, recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Attention turns here to initiative and burden of proof, in consideration of a question of the existence of the bases for refusal in recognition and enforcement of the international commercial arbitrations awards. The differences between these grounds for refusal in recognition and enforcement of the arbitral award consists in the following. Firstly, the bases "a, b, c, d, e" of paragraph 1 and the basis of "a" of paragraph 2 of Article V of the New York Convention 1958 have procedural character. The basis "b" of paragraph 2 of Article V of the New York Convention 1958 has meaningful character and belongs more to the substantive characteristic of both the very case and the possible consequences of arbitral award enforcement. Secondly, if the first group of bases ("a, b, c, d, e" paragraph 1 and basis "a" of paragraph 2 of Article V of the New York Convention 1958) has a more or less certain character, then the basis connected with a public order has a rather estimated character, and can be interpreted in various ways.

Thirdly, the distinction as to burden of proof is essential. In proving the bases of paragraph 1 of Article V of the New York Convention of 1958 a duty of proof of existence or lack of the specified procedural legal facts is assigned to the party against whom the arbitral award is directed. The legal facts specified in paragraph 2 of Article V of the New York Convention 1958 can be both proved by the party against whom the arbitration award has been directed and established at the initiative of the very state court that considers the application for recognition and enforcement of the arbitral award. The court may refuse *ex officio* the recognition of the arbitral award if it establishes these actual circumstances. Here there is the beginning of judicial intensity in evidentiary activity when the arbitration tribunal, irrespective of requirements and the objections of the parties, by law includes certain facts in a subject matter.

In this aspect, the proceeding of recognition and enforcement of foreign decisions has the specifics, in this plan, which are reflected in court activity and in manifestation

of the public, the beginning of which reflects protection of the national legal space against the decisions that deny the essential characteristics of the public system of any country. Unlike traditional rules of civil and arbitral procedure, in this plan the court has the obligation to manifest an initiative for the purpose of the establishment of the facts of circumstance, in proof, in this proceeding.

However, the general, uniting beginning of all bases of Article V of the New York Convention 1958 is that the competent court, considering the application for recognition and enforcement of the foreign arbitral award, has no right to reconsider the merits of the application, from the point of view of the correctness of the application of substantive law, definition of a subject of proof, and assessment of proofs.

Grounds for refusing, in the law of the Russian Federation on international commercial arbitration

The same bases are found in Article 36 of the Law of the Russian Federation on International Commercial Arbitrage.

Inter alia, recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(1) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

– a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

– the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

– the award was made regarding a dispute 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; or

– the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

– the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(2) if the court finds that:

– the subject matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or

– the recognition or enforcement of the award would be contrary to the public policy of the Russian Federation.

Apparently, the bases for refusal, the rules of distribution of responsibilities for proving, and the presence of powers of *ex officio* at an arbitration tribunal are quite similar to the provisions of Article V of the New York Convention of 1958.

The foreign arbitral awards which do not demand enforcement are noted here. During the last arbitration reform, there were provisions which consider the division of claims and decisions into arbitral decisions on awarding and arbitral decisions on recognition of the right. Such a division has an impact not only on consideration of corresponding cases, but also on their execution.

According to the new Part 3 of Article 35 of the Law of the Russian Federation on International Commercial Arbitration, in the case of making an arbitral decision outside the Russian Federation which does not demand enforcement, the party against whom the specified decision has been made has the right to declare objections against recognition of the specified decision in the Russian Federation, due to the bases and the procedure which are established by the procedural legislation of the Russian Federation. For example, the foreign international commercial arbitrage has made an award for recognition of the transaction with the participation of the Russian society invalid while in the Russian court the question of execution of the obligation which arose from this transaction is being considered. In that case, there is a need to define the legal consequences of such a foreign arbitral award for Russian civilian circulation

The procedure of objections was provided in Article 245.1 of the Commercial Procedure Code of the Russian Federation. In particular, the foreign arbitral decisions which do not demand enforcement are admitted in the Russian Federation if their recognition is provided for by international treaty of which the Russian Federation is a party and federal law. Such foreign arbitral decisions which do not demand enforcement are admitted without any further proceeding if the person concerned does not submit objections concerning it.

The interested person, within one month after he became aware of the foreign arbitral decision, may declare objections concerning recognition of this decision to the arbitration tribunal of the territorial subject of the Russian Federation at the location or the residence of the interested person or at the location of his property, and if the interested person does not take the residence, at the location or property in the Russian Federation, to the Arbitration tribunal of the city of Moscow.

The application of the interested person for objections against the foreign arbitral award is submitted in writing and has to be signed by the interested person or by his representative.

The application should include the motion of the interested person for refusal in the recognition of the foreign arbitral award *inter alia* with a reduction of the bases for refusal in such recognition, and also with a justification for violation of the rights and legitimate interests of the interested person in the sphere of entrepreneurial and other economic activity in the Russian Federation by the specified award.

An application is considered within a period of time which does not exceed one month from the day of its receipt by the commercial court. Upon consideration of the application, the commercial court has the right to call persons to participate in the case, with regard to whose rights and duties the foreign arbitral decision has been made, with an extension of the period of time of consideration of this application. Failure of said persons, including the interested person, properly notified of the time and place of the court session, to appear is not an obstacle for the consideration of the case.

The arbitration tribunal refuses the recognition of the foreign arbitral award on the grounds stipulated in the Law of the Russian Federation on International Commercial Arbitration for refusal in recognition and enforcement of the International Commercial Arbitration award unless otherwise stipulated in an international treaty of the Russian Federation.

The ruling in a case on the recognition of a foreign arbitration award that does not demand enforcement may be appealed against to a cassational commercial court within one month from the day of issuance of the ruling.

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ACCESS TO THE FEDERAL COURT OF JUSTICE IN GERMANY*

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Abstract: This goal of this paper is to explain the role of the German Federal Court of Justice in the civil justice system. The Federal Court of Justice is the highest court of ordinary jurisdiction, instituted in 1950 and it is competent to hear both civil and criminal matters. Specialised jurisdiction for labour cases, administrative law or criminal law will not be dealt with. After a brief overview of the institutional aspects, the main part of the paper is devoted to issues of access to the Federal Court of Justice as well as the scope of judicial control on appeal. The main problem consists in finding the right balance between the goal of doing justice and the goal to clarify and develop the law. The author gives detailed of organization the work of the court and analyse nowadays situation by giving factual basis and some statistical information and notes for important restrictions made by court reform.

Key words: access to justice, federal courts, civil justice system, judicial control, Germany

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I. THE ROLE OF THE FEDERAL COURT OF JUSTICE IN THE COURT SYSTEM

1. A Brief historical sketch

The Federal Court of Justice (*Bundesgerichtshof*) is the highest court of ordinary jurisdiction; it is competent to hear both civil and criminal matters. It was instituted on 1 October 1950, its seat being in Karlsruhe (sec. 123 Judicature Act – *Gerichtsverfassungsgesetz, GVG*). Only a short time before, on 24 May 1949, the German Constitution, since then called Basic Law (*Grundgesetz – GG*), had been enacted, providing the legal basis for the Federal Court of Justice for West Germany in Article 95 (1) *GG*. There was considerable competition of German cities in order to be chosen as the seat of the newly established Court: While Chancellor Konrad Adenauer favoured his hometown, Cologne, where the Federal Court would be located in close distance to the new capital, Bonn, the German Parliament (*Bundestag*) voted in favour of Karlsruhe, the old residence city of the Great Duchy of Baden. The other candidate cities, Kassel, Hamburg, Brunswick (Braunschweig), and Bamberg, were unsuccessful. One of the criminal panels, the Fifth Senate, was moved to West Berlin in 1952. In the German Democratic Republic the Supreme Court of the GDR (*Oberstes Gericht der DDR*) had jurisdiction in civil and criminal matters. It was set up in 1949 in Berlin (East) and abolished by the Unification Treaty in October 1990. The initiative to move the seat of the Federal Supreme Court to Leipzig, the past seat of the Imperial Court (*Reichsgericht*), faced severe opposition by the judges. Only the Fifth Criminal Senate was moved from Berlin to Leipzig in 1997.

When taking into account the long history of Supreme Courts in Germany, the Federal Court of Justice can look back on a tradition of more than 500 years of administration of justice. Its immediate predecessor, the Imperial Court of Justice (*Reichsgericht*) existed from 1879 to 1945, its seat being in Leipzig, as a successor to the Higher Commercial Court of the Empire (*Reichsoberhandelsgericht*), which had been established in 1871 already. The main function of the Imperial Court of Justice was to bring legal coherence to the German Empire which had been founded in 1871, more specifically to ensure uniform application of a series of new acts, such as the Code of Civil Procedure (*Zivilprozessordnung – ZPO*), the Judicature Act (*Gerichtsverfassungsgesetz – GVG*), the Bankruptcy Act (*Konkursordnung – KO*), the Code of Criminal Procedure (*Straßprozessordnung – StPO*),[1] and, later on, the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) and the Commercial Code (*Handelsgesetzbuch – HGB*), which entered into force on 1 January 1900. The Imperial Court of Justice was abolished by the Allies in 1945 as it was seen as a major proponent of the Nazi regime.[2] In fact, from 1933 to 1945, the court has issued numerous politically

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[1] These statutes are commonly referred to as the Imperial Judicial Acts (*Reichsjustizgesetze*). They entered into force on 1 October 1879.

[2] See the account given by the *Bundesgerichtshof (BGH)*, NJW 1952, 937.

motivated death sentences. Moreover, it was entangled in the Nazi ideology which led to racially motivated judgments in family and contract law even before the regime had formally enacted the Nuremberg Race Laws in 1935.[1]

From 1495 to 1806 the Imperial Chamber Court (*Reichskammergericht*) was the highest Court of Justice in the Holy Roman Empire, its seat being in Wetzlar (from 1689). It mainly dealt with appeals against civil judgments of inferior courts.[2] However, as the competence of the *Reichskammergericht* posed a threat to the power of the princes of the Empire, they strived to undermine the possibility to appeal against the judgments of the local courts within their territory. Consequently, most of them obtained (in exchange for an adequate counterperformance) a *privilegium de non appellando* which banned appeals to the *Reichskammergericht*, severely limiting the practical influence of that court.

It may come as a surprise to foreign lawyers that the highest courts are, and almost always were, located outside the capital city. This can be explained as a consequence of German particularism, in modern times in the guise of federalism. It creates a certain balance of powers and is deeply engrained in the DNA of the German justice system.

2. Institutional setting

a) Judicial hierarchy

The German civil court system consists of four levels: In the first instance, Local Courts (*Amtsgerichte*) or Regional Courts (*Landgerichte*) are competent to hear civil cases, depending on the value of the claim: Local Courts hear cases with an amount in controversy of up to € 5000,-. For all other cases the Regional Courts are competent.[3] The latter are also competent to hear appeals against decisions of Local Courts. Higher Regional Courts (*Oberlandesgerichte*) mainly have appellate jurisdiction over decisions by Regional Courts.[4] Finally, the Federal Court of Justice (*Bundesgerichtshof*) is the final court of appeal in civil (and criminal) matters.[5]

b) Organisation of Federal Court of Justice

There are 129 judges working at the *Bundesgerichtshof* (civil and criminal division).[6] The civil division of the *Bundesgerichtshof* has 84 judges; it is divided into 12 Senates sitting in

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1 See e.g. Imperial Court of Justice, RGZ 147, 65, 68, dealing with the duty to respect „aryan values" in education.

2 See amply *Weitzel*, Der Kampf um die Appellation ans Reichskammergericht, 1976.

3 See sec. 23, 71 Judicature Act (*Gerichtsverfassungsgesetz – GVG*).

4 See sec. 119 *GVG*.

5 See sec. 133, 135 *GVG*.

6 As of 31 December 2014. See the data provided by the Federal Office of Justice (*Bundesamt für Justiz*) at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?__blob=publicationFile&v=5 [all internet sites cited were last visited on 12 October 2016]. Other

panels of five judges, each having pre-defined competences and specialisations.[1] The First Senate, for instance, deals with intellectual property and copyright law, the Second Senate deals with company law, the Eleventh Senate with banking and capital markets law, etc.[2] As a matter of internal organisation a Senate may defer a case to another Senate if it finds unanimously that the legal points raised fall under the competence of that Senate. Pursuant to Article 101 (1) *GG*, "[n]o one may be removed from the jurisdiction of his lawful judge". As opposed to many other jurisdictions, in Germany the lawful judge must be determined in an abstract manner to avoid that cases may be conferred ad hoc on certain judges for political (or other) reasons. Certainly the degree of specialisation also helps increase the quality of decisions. To ensure uniformity within the 12 Senates of the *Bundesgerichtshof* a Grand Chamber (*Großer Senat für Zivilsachen*) will convene to decide on the request of one Senate wishing to deviate from the jurisprudence of other Senates.[3]

As a matter of fact, mostly only senior judges will be appointed as members of the Federal Court of Justice. The law, however, only prescribes that candidates must be at least 35 years of age (sec. 125 (2) *GVG*). Mostly candidates are chosen from within the judiciary.[4] It is quite rare for external jurists to be selected, one of the reasons being the pensions system for judges which does not welcome career changers. Pursuant to the Law on the Election of Judges (*Richterwahlgesetz – RiWG*) the competent Federal Minister may appoint judges of the Federal Supreme Courts together with the Judicial Election Committee (*Richterwahlausschuss*) in which the Federal States are duly represented (sec. 2-7 *RiWG*). Thus, the appointment of members of the *Bundesgerichtshof* falls within the competence of the Minister of Justice. That process seems to be much less of a political nature than the appointment of judges at the Federal Constitutional Court.

c) Other Federal Supreme Courts

There are five more Federal Supreme Courts: the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court as supreme courts of administrative, financial, labour and social jurisdiction. The existence

Federal Supreme Courts: Federal Constitutional Court (*Bundesverfassungsgericht*): 16 judges; Federal Administrative Court (*Bundesverwaltungsgericht*): 55 judges; Federal Finance Court (*Bundesfinanzhof*): 57 judges; Federal Labour Court (*Bundesarbeitsgericht*): 36 judges; Federal Social Court (*Bundessozialgericht*): 42 judges; Federal Patent Court (*Bundespatentgericht*): 109 judges; Military Court (*Truppendienstgericht*): 12 judges.

1 There are other Senates such as the Cartel Claims Senate, see the overview at http://www.bundesgerichtshof.de/DE/DasGericht/Geschaeftsverteilung/SachlicheZustaendigkeit/WeitereSenate/weitereSenate_node.html.

2 See the detailed organisational plan (*Geschäftsverteilungsplan*), available at http://www.bundesgerichtshof.de/DE/DasGericht/StellungGerichtssystem/RechtlicheGrundlagen/rechtlicheGrundlagen_node.html.

3 Sec. 132 *GVG*.

4 Note that this does not hold true for the Federal Constitutional Court as frequently law professors are appointed as judges.

of these Courts is enshrined in Article 95 (1) Basic Law (*Grundgesetz – GG*). Moreover, a Federal Patents Court has been set up (Article 96 (1) Basic Law).[1]

As a consequence of such a multitude of Federal Supreme Courts a Common Senate of the Federal Supreme Courts (*Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes*) has been created (Article 95 (3) Basic Law).[2] That Common Senate deals with overarching legal issues to maintain uniformity. It convenes only very rarely. One of the cases decided concerned the admissibility of claim forms filed by way of computer fax.[3]

d) Federal Constitutional Court

For constitutional matters, the Federal Constitutional Court (*Bundesverfassungsgericht*) has been set up (Article 93 (1) Basic Law). It deals with civil cases only exceptionally, namely if, on a constitutional complaint, an individual alleges that one of her basic rights (Articles 1 to 20 Basic Law) or other rights as set out in the constitution have been infringed by a court (or, indeed, any other public authority).[4] The Federal Constitutional Court has shown considerable interest in civil law cases, and was therefore dubbed "super appeal court" ("*Superrevisionsinstanz*").[5] The jurisprudence of the Court was quite influential on the development of private law. In the famous *Lüth* case it has endorsed the doctrine of indirect effect of fundamental rights on private law (*Drittwirkung der Grundrechte*)[6] and, through that, considerably changed private law thinking. Other landmark cases include judgments on the validity of post-contractual non-competition clauses without compensation in commercial agency,[7] the validity of oppressive suretyships,[8] and contractual freedom in marriage contracts.[9]

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1 In total, there are 429 Federal Judges, see the reference provided above in note 8.

2 The legal basis is the *Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes vom 19. Juni 1968*, BGBl. I S. 661. See generally *Martin Schulte*, Rechtsprechungseinheit als Verfassungsauftrag: Dargestellt am Beispiel des Gemeinsamen Senats der obersten Gerichtshöfe des Bundes, 1986.

3 Gemeinsamer Senat der obersten Gerichtshöfe des Bundes, Beschluss vom 5.4.2000, Az. GmS-OGB 1/98 – *Computerfax*, BGHZ 144, 160.

4 Between 1991 and 2013, 113.735 constitutional complaints were filed with the Constitutional Court, 45.349 out of which were against judgments in civil cases. The overall success rate, however, is only about 2.5%. Cf. http://www.bundesverfassungsgericht.de/organisation/statistik_2013.html.

5 The term has been used by the Constitutional Court itself; cf. BVerfGE 7, 198, at para. 31: „So wenig das Bundesverfassungsgericht berufen ist, als Revisions- oder gar 'Superrevisions'-Instanz gegenüber den Zivilgerichten tätig zu werden, sowenig darf es von der Nachprüfung solcher Urteile allgemein absehen und an einer in ihnen etwa zutage tretenden Verkennung grundrechtlicher Normen und Maßstäbe vorübergehen." See *Krauß*, Der Umfang der Prüfung von Zivilurteilen durch das Bundesverfassungsgericht, Diss. Erlangen 1987 (§ 6); *Hager*, Von der Konstitutionalisierung des Zivilrechts zur Zivilisierung der Konstitutionalisierung, JuS 2006, 769, at 773 et seq.

6 BVerfGE 7, 198 (*Lüth*).

7 BVerfGE 81, 242 (*Handelsvertreter*).

8 BVerfGE 89, 214 (*Bürgschaftsfall*).

9 BVerfGE 103, 89 (*Ehevertrag*).

However, as the catalogue of rights includes procedural guarantees such as the right to be heard, quite frequently the constitutional complaint is used by the aggrieved party as a last resort. In order to prevent the constitutional complaint from becoming an extraordinary appeal, the plenary Constitutional Court held in a landmark case that the legislator should enable the ordinary courts to provide redress in cases of violations of the right to be heard.[1] As a consequence, sec. 321a was inserted in the Code of Civil Procedure which gives the aggrieved party the right to object to the judex ad quem.[2]

3. The civil appellate system

The German Code of Civil Procedure (*Zivilprozessordnung – ZPO*) establishes three regular types of appeal:[3] the ordinary appeal (*Berufung*, sec. 511 et seq. *ZPO*), the appeal on points of law (*Revision*, sec. 542 et seq. *ZPO*) and the complaint (*Beschwerde*, sec. 567 et seq. *ZPO*).[4] In 2001 a major reform of civil procedure was enacted.[5] It entered into force on 1 January 2002, introducing important changes to the appellate system.

According to the (still) predominant opinion in the legal literature, the German constitution does not guarantee a right of appeal.[6] From the very beginning the Constitutional Court has shared this view.[7] While it is true that there is no explicit provision in the Basic Law conferring a right to a further instance, the constitution does guarantee judicial protection against any act of the public authority (Article 19 (4) Basic Law). Quite clearly, courts of law are part of the public authority.[8] It follows from this, at least in the view of a number of authors, that in principle an appeal must lie against

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1 BVerfGE 107, 395 (*Rechtsschutz gegen den Richter*).

2 Sec. 321a (1) *ZPO* reads: „Redress granted in the event a party's right to be given an effective and fair legal hearing has been violated. (1) Upon an objection having been filed by the party adversely affected by the decision, the proceedings are to be continued if:

1. No appellate remedy or any other legal remedy is available against the decision, and

2. The court has violated the entitlement of this party to be given an effective and fair legal hearing and this has significantly affected the decision.

No objection may be filed against any decision preceding the final decision."

3 For a brief history of the law of appeals in Germany as well as for further references see *M. Stürner*, Die Anfechtung von Zivilurteilen, 2002, pp. 7 et seq.

4 Furthermore, proceedings may be reopened under very limited conditions, see sec. 578 et seq. *ZPO*.

5 Gesetz zur Reform des Zivilprozesses vom 27.7.2001, BGBl I, Nr. 40, S. 1887.

6 See e.g. Maunz/Dürig/*Schmidt-Aßmann*, Grundgesetz, 42. Ed. 2003, Art. 19 (4) note 96 et seq.; BeckOK-GG/*Enders*, 20. Ed. 2014, Art. 19 GG note 57; both with further references.

7 See e.g. BVerfGE 1, 433, 437.

8 The (presumably still) predominant opinion, however, takes the rather narrow view that Article 19 (4) Basic Law guarantees a legal remedy *by* the judge, not *against* him („Rechtsschutz *durch*, nicht *gegen* den Richter", see BVerfGE 15, 275, 280; BVerfGE 49, 329, 340; BVerfGE 65, 76, 90). That maxim has been coined by *Günter Dürig*, see Maunz/Dürig, Erstkommentierung, 1958, Article 19 (4) at note 17.

any decision of a court.[1] However, as this would lead to an infinite chain of appeals, it is up to the legislator to set up limits, taking into account other constitutional values such as the principle of finality. Restrictions on access to the appellate court must be designed following the principle of proportionality.[2]

While denying such a concept in principle, the Constitutional Court did accept in a plenary decision that the rule of law requires a legal remedy against the violation of the right to be heard.[3] However, the Court held that such remedy may be designed in a way that it could be dealt with by the judex a quo, thus leaving unchanged the position taken in earlier decisions.[4]

a) Appeal (*Berufung*)

An appeal lies against the final judgments delivered by the court of first instance (sec. 511 (1) *ZPO*).[5] In case the court of first instance was a Local Court, the appeal will be heard by the Regional Courts. In case the Regional Court was the court of first instance, the appeal will be heard by the Higher Regional Courts. Generally, almost every case will be suitable for appellate review. Pursuant to sec. 511 (2) *ZPO*, an appeal shall be admissible if the value of the subject matter of the appeal is greater than € 600. Even for cases below that threshold, the court of first instance may grant leave to appeal, namely if the "legal matter is of fundamental significance or wherever the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court of appeal" (sec. 511 (4) *ZPO*). The decision to grant leave is not discretionary as the statutory requirements just mentioned must be fulfilled. A U.S. type writ of certiorari is unknown to German civil procedure. Admittedly, at least on the face of it the difference would be one of degree as the statutory requirements under German law are relatively broadly construed. Yet a considerably bulk of case law exists to clarify exactly what is a question of fundamental significance. Once those requirements are met the case has to be dealt with without any discretion.

The appeal has a double focus: First, it may be based on the allegation that the decision handed down was wrongly decided from a legal point of view. Second, the

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1 See *Voßkuhle*, Rechtsschutz gegen den Richter. Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 IV GG, 1993; *Voßkuhle*, Bruch mit einem Dogma – Die Verfassung garantiert Rechtsschutz gegen den Richter, NJW 2003, 2193; *M. Stürner*, Die Anfechtung von Zivilurteilen, 2002, pp. 66 et seq.

2 For that rationale see *M. Stürner*, Die Anfechtung von Zivilurteilen, 2002, pp. 79 et seq.

3 BVerfGE 107, 395: „Es verstößt gegen das Rechtsstaatsprinzip in Verbindung mit Artikel 103 Absatz 1 des Grundgesetzes, wenn eine Verfahrensordnung keine fachgerichtliche Abhilfemöglichkeit für den Fall vorsieht, dass ein Gericht in entscheidungserheblicher Weise den Anspruch auf rechtliches Gehör verletzt." That has been reiterated in BVerfGE 108, 341, 347.

4 See the reference in note 28. The legislator reacted soon after the decision inserting sec. 321a *ZPO*, see note 16.

5 For a comparative Anglo-German perspective see *M. Stürner*, Die Anfechtung von Zivilurteilen, 2002, pp. 106 et seq.

appellant may claim that the factual basis of the decision was wrong (sec. 513 (1) *ZPO*). However, there's only limited scope of review of fact-finding. As a matter of principle, the appellate court is bound by the facts established by the court of first instance. It is only unless "specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision" that a new fact-finding process will be permissible (sec. 529 (1) No. 1 *ZPO*).[1] Moreover, new facts and circumstances may be introduced under limited conditions (sec. 529 (1) No. 2, 531 *ZPO*).[2]

As parties made ample use of their right to challenge court decisions, the appellate courts were flooded with unmeritorious appeals.[3] Consequently, the reform of 2001 introduced a doorkeeper: Pursuant to sec. 522 (2) *ZPO*, the appellate court may strike out such appeals if it is satisfied that

"1. The appeal manifestly has no chance of success;

2. The legal matter is not of any fundamental significance;

3. The further development of the law or the interests in ensuring uniform adjudication do not require a decision to be handed down by the court of appeal; and that

4. No hearing for oral argument is mandated."

The parties will be informed of the intention of the court to strike out the appeal, and the appellant will get the opportunity to submit her position within a period of time to be set (sec. 522 (3) *ZPO*).[4]

Immediately after the reform introducing the possibility to strike out unmeritorious appeals the situation was quite unsatisfactory as court practice varied considerably: Some courts struck out almost 60% of appeals, others only 20% or so.[5] There was no way to attack the decision of the court. Recently the legislator has introduced an important change.[6] Pursuant to the new sec. 522 (3) *ZPO* the unsuccessful appellant may attack the decision striking out the appeal with an appeal on points of law under the same conditions as if a full judgment were handed down by the appellate court.

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[1] See *Arnold*, Zur Überprüfung tatrichterlicher Ermessensspielräume im Zivilprozess, ZZP 126 (2013), 63.

[2] Sec. 531 (2) *ZPO* reads: „(2) New means of challenge or defence are to be admitted only if they: 1. Concern an aspect that the court of first instance has recognisably failed to see or has held to be insignificant; 2. Were not asserted in the proceedings before the court of first instance due to a defect in the proceedings; or 3. Were not asserted in the proceedings before the court of first instance, without this being due to the negligence of the party."

[3] Germany was sometimes seen as a "*Rechtsmittelstaat*" (the term plays with the central notion of *Rechtsstaat*, i.e. a state governed by the rule of law; *Rechtsmittel* means appeal): see e.g. *Justizministerium Baden-Württemberg* (Hrsg.), Rechtsstaat – Rechtsmittelstaat?, 1999; some commentators ironically referred to the German „*Instanzenseeligkeit*", cf. *Zeidler*, Rechtsstaat '83, DRiZ 1983, 249, 253; *Sendler*, Zum Instanzenzug in der Verwaltungsgerichtsbarkeit, DVBl. 1982, 157, 164.

[4] See *Matthias Weller*, Rechtsfindung und Rechtsmittel: Zur Reform der zivilprozessualen Zurückweisung der Berufung durch Beschluss, ZZP 124 (2011), 343.

[5] Cf. *Greger*, Die ZPO-Reform – 1000 Tage danach, JZ 2004, 805, 813.

[6] Gesetz zur Änderung des § 522 der Zivilprozessordnung, BGBl. I Nr. 53 vom 26. Oktober 2011, S. 2082, in force since 27 October 2011.

b) Appeal on points of law (*Revision*)

Pursuant to sec. 542 (1) *ZPO*, "an appeal on points of law may be filed against the final judgments delivered by the appellate instance on fact and law". Such appeals on points of law will be heard by the Federal Court of Justice (*Bundesgerichtshof*). The goal of the appellate proceedings is revision, not cassation. That means that in case of a successful appeal the judgment of the lower court will not just be quashed. The Federal Court of Justice may hand down a decision on the merits, provided that "the judgment is reversed only due to a violation of the law, in application of the law to the situation of fact as established, and if in light of said situation the matter is ready for the final decision to be taken" (sec. 563 (3) *ZPO*). Pursuant to sec. 566 (1) *ZPO*, a so-called leapfrog appeal (*Sprungrevision*) may be brought against final judgments of first instance courts provided that the defendant consents and the appellate court allows the appeal.

In family matters the appeal on points of law is called *Rechtsbeschwerde*, it is regulated in sec. 70 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG)*. It basically follows the same pattern as the revision in civil cases. It will also be heard by the *Bundesgerichtshof*.

Some statistics:[1] 4348 appeals were lodged in 2013. In 715 cases (16.4%) leave was given by the lower court (*Revisionszulassung*);[2] all the others were complaints against denial of leave (*Nichtzulassungsbeschwerden*).[3] At the beginning of the same year, 4023 cases were pending.[4] 4228 cases were disposed of; 700 of which by way of final judgment (16.6%); in only 275 cases (or 8%) the complaint against denial of leave (*Nichtzulassungsbeschwerde*) was successful. 1106 appeals (26.2%) were inadmissible (*unzulässig*) or were withdrawn; 62 appeals (1.5%) were struck out for obviously being unmeritorious (sec. 552a *ZPO*).[5]

It is difficult to provide an average duration of the proceedings before the Federal Court of Justice. The official statistics indicate that slightly more than 50% of all appeals are disposed of in less than 12 months.[6]

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1 See the Annual Report (*Jahresstatistik*) 2013, available at http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/DerBGH/StatistikZivil/jahresstatistikZivilsenate2013.pdf?__blob=publicationFile.

2 When also counting appeals on the basis of special legislation such as appeals (*Berufungen*) in patent law or complaints on points of law (*Rechtsbeschwerden*) in energy law and in competition law the number of incoming cases amounts to a total of 6743.

3 Taking into account complaints pursuant to sec. 544 (1) *ZPO* as well as sec. 522 (3) *ZPO*; also considering applications for leapgfrog appeal pursuant to sec. 566 (1) *ZPO*.

4 A total of 5127 considering cases outside the scope of application of the Code of Civil Procedure (*ZPO*), see note 35.

5 See below at II. 3.

6 Annual Report (note 34), at p. 32 et seq.

c) Complaint (*Beschwerde*) and complaint on points of law (*Rechtsbeschwerde*)

The Code of Civil Procedure sets up a third type of remedy: the so-called complaint. It may be filed against the decisions delivered by the Local Courts (*Amtsgerichte*) and Regional Courts (*Landgerichte*) in proceedings before them as courts of first instance provided that those decisions did not require an oral hearing and dismissed a petition concerning the proceedings (sec. 567 *ZPO*). It will be dealt with in this paper only insofar as it concerns access to the Federal Court of Justice, namely in the form of complaint against denial of leave to appeal (sec. 544 *ZPO*: *Nichtzulassungsbeschwerde*) and the complaint on points of law (sec. 574 *ZPO*: *Rechtsbeschwerde*).

II. RESTRICTING ACCESS TO THE FEDERAL COURT OF JUSTICE

Quite clearly, access to the highest instance has to be restricted in order to enable the court to concentrate on those cases which merit closer attention because they raise important legal issues for society at large. One model confers the power to choose those cases on the Supreme Court (example: U.S.A.[1]). Other models mainly entrust the appellate courts with that responsibility (example: Germany[2]). A third model combines both approaches (example: UK[3]).

1. The old system

The major reform of civil procedure of 2001 mainly concerned the (ordinary) appeal (*Berufung*), but also brought about some changes to the appeal on points of law. Before that reform access to the Federal Court of Justice was possible in two different constellations:[4] (1) In cases where the value of the claim was below DM 60.000 (or € 30.000), leave had to be granted by the appellate court (*Zulassungsrevision*). (2) Where the value of the claim was above that sum, appeal was possible without leave of the court (*Wertrevision*). However, the Federal Court of Justice had the power to dismiss such appeals with a majority of 2/3 of the members of the senate provided that the case did not raise any legal matters of fundamental significance[5] and was obviously unmeritorious.[6] That provision was criticised

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1 28 USC § 1254 (1), § 1257 (a). See *Schack*, Einführung in das US-amerikanische Zivilprozessrecht, 4. Aufl. 2011, Rn. 7 with references.

2 Note, however, that there is a complaint against denial of leave to appeal (sec. 544 *ZPO*: *Nichtzulassungsbeschwerde*). See below, at 2 b).

3 *Andrews*, On Civil Procedure, Vol. I, 2013, Ch. 15. See Article 40 Constitutional Reform Act 2005, available at http://www.legislation.gov.uk/ukpga/2005/4/section/40.

4 Sec. 546 *ZPO* as of 2001. See amply *Prütting*, Die Zulassung der Revision, 1977.

5 *Nichtannahmebeschluss*, sec. 554b *ZPO* as of 2001.

6 Cf. BVerfGE 54, 277.

as about 80% of all cases did not qualify for an appeal on points of law.[1] The functions of the Federal Court of Justice to clarify and develop the law were not properly served.

2. Admission to appeal[2]

a) Admission by lower court

The basic assumption is that the appellate court (judex a quo) has the best knowledge of the case and, consequently, is in a position to evaluate the case's suitability for appellate review. Thus, sec. 543 (1) No. 1 *ZPO* provides that an appeal on points of law may be lodged only if it is admitted by the appellate court. As a matter of law, not discretion, an appeal on points of law is to be admitted if: (1) The legal matter is of fundamental significance, or (2) the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court hearing the appeal on points of law (sec. 543 (2) *ZPO*). The court hearing the appeal on points of law is bound by the decision of the lower court. Those reasons for admittance reiterate the model of the ordinary appeal (sec. 511 (4) *ZPO*[3]). They ensure that the public interest in uniform adjudication and clarification of the law will be duly served.[4]

b) Appeal against denial of admission (*Nichtzulassungsbeschwerde*)

The decision of the appellate court is not final. In cases where leave to appeal is denied by the judex a quo, the aggrieved party may lodge a complaint against the denial of leave to appeal pursuant to sec. 544 *ZPO*. The complainant must set out the grounds on which leave to file an appeal should be granted (sec. 544 (2) (3) *ZPO*) – these are identical to those set out in sec. 543 (2) *ZPO*.

Consequently, the mere fact that the decision by the appeal court was wrong does not justify the complaint. Even blatantly wrong decisions or violations of fundamental procedural rights will not fulfil the criterion of ensuring uniform adjudication. There will only be fundamental legal significance if the case was decided arbitrarily and a constitutional complaint would be manifestly well-founded.[5] The individual interest in receiving a correct judgment ranks lower than the public interest in clarifying and developing the law. A reform act of 2013[6] further strengthened the public dimension of the *Revision*: Pursuant to sec.

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1 See Bericht zur Rechtsmittelreform in Zivilsachen, C.1.1.1.2. The Report can be downloaded at http://gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/Zivilprozessreformgesetz/b_rechtsmittelr_zs-index.htm.

2 Cf. *Althammer*, Die Zukunft des Rechtsmittelrechts, in: Bruns/Münch/Stadler (eds.), Die Zukunft des Zivilprozesses, 2014, p. 87, 98 et seq.

3 See above at I 2 a).

4 Cf. BGHZ 152, 182.

5 Cf. *BGHZ* 152, p. 182.

6 *Gesetz zur Förderung des elektronischen Rechtsverkehrs mit den Gerichten* vom 10.10.2013 (*BGBl*. I, p. 3786). It entered into force on 1 January 2014.

555 (3) *ZPO* a judgment based on the respondent's acknowledgment (*Anerkenntnisurteil*) shall be handed down only where the claimant has filed a separate petition to this effect. Insofar the law diverts from the basic principle enshrined in sec. 307 *ZPO*, which mirrors the parties' freedom to dispose of the material claim at stake (*Dispositionsmaxime*). By the same token, pursuant to sec. 565 *ZPO* a *Revision* may be withdrawn without the consent of the respondent only prior to the time at which the respondent commences oral argument on the merits of the case. The reform can be seen as a reaction to the fact that large corporate respondents (e.g. banks, insurances) tried to drop out of the proceedings as soon as they realised that the case was lost in order to avoid full judgment (see sec. 313b (1) *ZPO*).[1] Note that the legislator thereby returned to the law as it stood before the reform of 2001.

The Code of Civil Procedure does not contain any monetary threshold. The old system was done away with in 2001 as the legislator acknowledges that the fundamental importance of a case is in no way determined by the value of the claim.[2] However, the old system was somehow conserved by the back door: The transitional provision hidden in sec. 26 No. 8 of the Introductory Act to the Code of Civil Procedure (*Einführungsgesetz zur Zivilprozessordnung – EGZPO*) provides that the value of the claim (*Wert der Beschwer*) must be above € 20.000. Otherwise no complaint will be possible against a denial by the appellate court to grant leave to appeal. That regime has been extended until 30 June 2018.[3]

3. Striking out revisions

Similar to the ordinary appeal, the *Bundesgerichtshof* may strike out unmeritorious appeals on points of law: Pursuant to sec. 552a *ZPO* the court shall dismiss by unanimous decision the appeal on points of law admitted by the court of appeal if the court hearing the appeal on points of law is convinced that the prerequisites for admitting the appeal on points of law have not been met and that the appeal on points of law has no chance of success. Just as in second-tier appeals[4] the court has to carry through a full-blown

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1 Cf. *Winter*, Revisionsrücknahme und Anerkenntnisurteil in dritter Instanz, NJW 2014, 267.

2 *Referentenentwurf eines Gesetzes zur Reform des Zivilprozesses* vom 23.12.1999, p. 83 et seq. The full text can be downloaded at http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/Zivilprozessreformgesetz/RefE.pdf.

3 The *Zweites Gesetz zur Modernisierung der Justiz* vom 22.12.2006 (*BGBl.* I, p. 3416) extended the sunset clause from 2006 until 2011; the *Gesetz zur Änderung des § 522 ZPO* vom 21.10.2011 (*BGBl.* I, p. 2082) brought about a further extension from 2011 until 2014. The *Gesetz zur Erleichterung der Umsetzung der Grundbuchamtsreform in Baden-Württemberg sowie zur Änderung des Gesetzes betreffend die Einführung der Zivilprozessordnung und des Wohnungseigentumsgesetzes* vom 5.12.2014 (*BGBl.* I, p. 1962), has extended that provision until 31 December 2016. The *Drittes Gesetz zur Änderung der Insolvenzordnung und zur Änderung des Gesetzes, betreffend die Einführung der Zivilprozessordnung* vom 22.12.2016 (*BGBl.* I, p. 3147) has brought about a further extension until 30 June 2018. The provision was held to be constitutional, see BGH NJW-RR 2003, 645.

4 Sec. 522 (2) *ZPO*, see above at 3. b) aa).

examination of the merits of the appeal. A prima facie case of lack of success will not suffice.[1]

4. Representation by counsel

Pursuant to sec. 78 (1) (3) *ZPO*, in proceedings before the *Bundesgerichtshof*, the parties to the dispute must be represented by an attorney admitted to practice before said court. There are currently only 43 attorneys admitted to the *Bundesgerichtshof*.[2] Those attorneys may not plead before lower courts (sec. 172 Federal Lawyers' Act – *Bundesrechtsanwaltsordnung, BRAO*). These restrictions were set up to maintain a high standard of legal arguments before the *Bundesgerichtshof*. Members of the special bar are appointed for lifetime by an election committee which consists of the President of the *Bundesgerichtshof*, the presidents of each of the 12 civil senates, the members of the presidium of the Federal Bar Association as well as the presidium of the Bar Association of the Bundesgerichtshof (sec. 165 (1) *BRAO*). The only formal requirements are a minimum age (35 years) as well as an uninterrupted practise as attorney for at least five years (sec. 166 (3) *BRAO*). There are no sanctions for filing unmeritorious claims to the *Bundesgerichtshof*. It will be in the best interest of each attorney to choose well-founded cases as their reputation, inter alia, builds upon a certain rate of success.

III. ISSUES ON APPEAL (*REVISIONSGRÜNDE*)

1. Basics

As opposed to the ordinary appeal, the appeal on points of law is restricted to legal issues.

a) Violation of the law

Pursuant to sec. 545 (1) *ZPO*, "an appeal on points of law may only be based on the reason that the contested decision is based on a violation of the law". Sec. 546 *ZPO* defines a violation of the law as an instance where "a legal norm has not been applied, or has not been applied properly". Such mistakes can be wrong applications of substantive provisions, such as a misguided interpretation of the notion of "intention" in the delictual responsibility pursuant to sec. 823 of the civil code (*BGB*)[3] or a wrong inference from the facts, e.g. the lower court's factual findings do not justify the assumption that the defendant has acted intentionally.[4] Besides, procedural mistakes are under review.

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[1] See *Krüger*, in: Münchener Kommentar zur ZPO, 5th ed. 2016, § 552a at note 2.

[2] Source: http://www.rak-bgh.de/.

[3] The German terminology is „*Interpretationsfehler*".

[4] The German terminology is „*Subsumtionsfehler*".

A violation of the rules of evidence (e.g. the principle of evaluation of evidence at the court's discretion pursuant to sec. 286 *ZPO*) could justify the appeal.

There has to be a causal link between the violation of the law and the judgment of the lower court. It may happen that the Federal Court of Justice finds a violation of the law, but nevertheless upholds the judgment appealed against as the outcome, e.g. denial of the claim, is justified. However, sec. 547 *ZPO* defines cases in which the decision of the appellate court is always to be regarded as unlawful ("absolute" reasons for an appeal on points of law). Such mistakes are considered to be so grave that leaving them unsanctioned may distort public confidence in the administration of justice. That concerns the following mistakes:

> "(1) the composition of the court of decision was not compliant with the relevant provisions;
> (2) a judge was involved in the decision who, by law, was prohibited from holding judicial office, unless this impediment has been asserted by a motion to recuse a judge without meeting with success;
> (3) a judge was involved in the decision although he had been recused for fear of bias and the motion to so recuse him had been declared justified;
> (4) a party to the proceedings had not been represented in accordance with the stipulations of the law, unless it had expressly or tacitly approved the litigation;
> (5) the decision has been given based on a hearing for oral argument in which the rules regarding the admission of the public to the proceedings were violated;
> (6) contrary to the provisions of the present Code, the decision does not set out the reasons for the judgment."

b) Factual basis

As to the relevant facts, there are, of course, important restrictions. The factual basis of the appellate control consists in the findings of the lower court that "are apparent from the appellate judgment or the record of the session of the court" (sec. 559 (1) *ZPO*). The Federal Court of Justice does not embark on a new assessment of factual allegations, it does not elicit evidence. The parties may not introduce new factual allegations, even though they may have come into existence after the appellate proceedings before the lower court.[1] The findings of the lower court with regard to factual allegations being true or untrue will be binding for the purposes of the appeal on points of law. The only exception to that rule concerns the situation in which the appellant has challenged the fact-finding process of the lower court by an admissible and justified petition, sec. 559 (2) *ZPO*.

2. Foreign law on appeal

As set out in the previous section, an appeal on points of law has to be based on a violation of the law. What if the lower court had to apply foreign law and got it wrong?

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[1] For exceptions see Thomas/Putzo/*Reichold*, ZPO, 35. Auflage 2014, § 559 notes 8 et seq.

a) Foreign legal provisions as law, not fact

In German law, like in many other countries, foreign law is not seen as a matter of fact, but as a matter of law. Consequently, the maxim iura novit curia applies.[1] The court has to apply foreign law ex officio. However, iura novit curia reaches its limits where the application of foreign law is concerned. The court can be expected to know German law only. Foreign law is outside the scope of the presumed knowledge of the judge.

Even though foreign law is not seen as a question of fact, when it comes to ascertaining its contents, the court is given the necessary power to establish the relevant rules of the applicable law. The relevant statutory provision is sec. 293 *ZPO*:

„Foreign law; customary law; statutes

The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use."

According to that provision, the court has a fairly large discretion as to how the content of the foreign law is established.[2] The approach towards foreign law is even more flexible as compared to the power the court has when establishing the facts of the case. The court is not necessarily bound by the strict law of evidence applying to the proof of facts.

First, the court can take advantage of its own knowledge about the relevant foreign law.[3] The court can use any source of information, e.g. manuals,[4] databases[5], internet sites,[6] etc. A further valuable source of information could be the European Judicial Network in civil and commercial matters.[7] Such sources, however, will only rarely completely solve every issue and will only help in straightforward cases.

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[1] See *Schilken*, Zur Rechtsnatur der Ermittlung ausländischen Rechts nach § 293 ZPO, in: Festschrift für Ekkehard Schumann, 2001, p. 373-388.

[2] Cf. BGHZ 118, 151 (so-called *Freibeweis* as opposed to the more formal *Strengbeweis*).

[3] See *Lindacher*, Zur Mitwirkung der Parteien bei der Ermittlung ausländischen Rechts, in: Festschrift für Ekkehard Schumann, 2001, p. 283; *Pfeiffer*, Methoden der Ermittlung ausländischen Rechts, in: Festschrift für Leipold, 2009, p. 283, 286.

[4] There is good deal of excellent manuals on foreign law in German language, see e.g. *Basedow*, *Coester-Waltjen* and *Mansel* (eds.), IPG – Gutachten zum Internationalen und Ausländischen Privat- und Verfahrensrecht (collection of experts' reports on foreign law prepared at the request of German courts); *Bergmann/Ferid/Henrich* (eds.), Internationales Ehe- und Kindschaftsrecht (Family Law), *Ferid/Firsching/Dörner/Hausmann*, Internationales Erbrecht (Law of Successions). An excellent source of information can be found in *von Bar*, Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache. Systematische Nachweise aus Schrifttum, Rechtsprechung und Gutachten, 9th ed. 2013.

[5] The manual edited by *von Bar* (previous note) is also available as a database at sellier.elp.

[6] See for instance for German law http://www.gesetze-im-internet.de.

[7] See http://ec.europa.eu/civiljustice/index_en.htm. That site mainly contains information on procedural issues, and not on substantive law.

Second, the court can (and often will) ask parties to provide information on foreign law:[1] The parties are under a duty to assist the court in fulfilling its task to ascertain the relevant content of the applicable law.[2]

If the court is unable to get satisfactory access to the relevant foreign law it will have to look at external sources. One possibility is to ask for judicial assistance which is available e.g. through the European Convention of 7 June 1968 on Information on Foreign Law (the „London Convention") set up under the auspices of the Council of Europe.[3] According to Article 3 of the Convention, a judicial authority may make a request for information concerning the law of another Contracting Party.

In complex cases German courts mostly appoint a court expert (sec. 402 *ZPO*).[4] That court expert gets the complete picture of the case as he is normally provided with the entire file of the case. The expert draws up an expert statement about the foreign law aspects of the whole case. Foreign law experts are usually law professors or specialists at large institutes such as the Max Planck Institute of Foreign and Comparative Law in Hamburg.

b) The appeal court's power of review

Before the reform of 2001 things were fairly clear. The former wording of sec. 545 *ZPO* restricted the scope of the appellate procedure mainly on violations of federal law (*Bundesrecht*).[5] The reform did away with that restriction as sec. 545 *ZPO* only refers to violations of the law. Consequently, the question arose whether or not the wrong application of foreign law could be an issue before the Federal Court of Justice.

The legal literature was (and still is) profoundly divided on the issue. Those arguing in favour of a full review of foreign law underline the fact that the need for a uniform application also comprises foreign law.[6] Foreign law plays a vital role for instance in the field of company law, where the advent of more and more foreign corporations (e.g. Limited Companies incorporated in the UK) entails the need for an application of the law of incorporation of those companies.[7] The Federal Court of Justice has excellent

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1 See *Lindacher*, Zur Mitwirkung der Parteien bei der Ermittlung ausländischen Rechts, in: Festschrift für Ekkehard Schumann, 2001, p. 283-294.

2 See BGH NJW 1976, 1581, 1583.

3 Ratification in Germany: BGBl. 1974 II, 938, 1975 II, 300. See *Jastrow*, Zur Ermittlung ausländischen Rechts: Was leistet das Londoner Auskunftsübereinkommen in der Praxis?, IPRax 2004, p. 402-405.

4 See *Pfeiffer*, Methoden der Ermittlung ausländischen Rechts, in: Festschrift für Leipold, 2009, p. 283, 294 et seq.

5 Legal norms below the federal level are under review only in case such norms are in force in more than one judicial district of a Higher Regional Court (OLG), see *Hess/Hübner*, Die Revisibilität ausländischen Rechts nach der Neufassung des § 545 ZPO, NJW 2009, 3132.

6 *Gottwald*, Auf dem Weg zur Neuordnung des internationalen Verfahrensrechts, ZZP 95 (1982), 3, 8 with references; *Aden*, Revisibilität des kollisionsrechtlich berufenen Rechts, RIW 2009, 475, 477.

7 *Mäsch*, Die Rolle des BGH im Wettbewerb der Rechtsordnungen oder: Neue Nahrung für den Ruf nach der Revisibilität ausländischen Rechts, EuZW 2004, 321.

access to information on foreign law.[1] That point of view is confirmed by the practice of the Federal Labour Court where review of foreign law is accepted.[2]

As opposed to that, those advocating the non-revisability of foreign law maintain that the review of foreign law cannot be seen as a goal of the Federal Court of Justice as the court's task – the development of the law and the uniform adjudication – inherently refers to national law only.[3] Moreover, when changing the wording of sec. 545 *ZPO*, the legislator had no intention of enabling the Federal Court of Justice to review foreign law.[4] The court might be flooded with new cases which would impede its proper functioning.[5] Finally, judgments of the Federal Court of Justice on foreign law might be considered "ridiculous" by foreign courts which could result in an unnecessary loss of reputation.[6]

That latter point of view has been endorsed by the Federal Court of Justice in two recent judgments.[7]

c) Review of foreign law "by the back door"

However, the Federal Court of Justice may review procedural mistakes in connection with the ascertaining of foreign law, e.g. violations of sec. 293 *ZPO* such as a misuse of the lower court's discretion.[8] As it is difficult to draw a sharp line between such

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1 *Gottwald*, Auf dem Weg zur Neuordnung des internationalen Verfahrensrechts, ZZP 95 (1982), 3, 8.

2 *Riehm*, Vom Gesetz, das klüger ist als seine Verfasser – Zur Revisibilität ausländischen Rechts, JZ 2014, 73, 75; *Aden*, Revisibilität des kollisionsrechtlich berufenen Rechts, RIW 2009, 475, 476. But see other procedural rules: sec. 72 (1) *FamFG* has the same wording as the *ZPO*. Some commentators even claim that the result of a non-revisability of foreign law could amount to a violation of the principle of non-discrimination (Article 18 TFEU), see *Flessner*, Diskriminierung von grenzübergreifenden Rechtsverhältnissen im europäischen Zivilprozess, ZEuP 2006, 737, 738; *Hess/Hübner*, Die Revisibilität ausländischen Rechts nach der Neufassung des § 545 ZPO, NJW 2009, 3132, 3133; *Mankowski/Hölscher/Gerhardt*, in: Rengeling/Middeke/Gellermann (Hrsg), Handbuch des Rechtsschutzes der Europäischen Union, 3. Auflage 2014, § 38 Rn. 89 („indirect discrimination")

3 *Roth*, Die Revisibilität ausländischen Rechts und die Klugheit des Gesetzes, NJW 2014, 1224, 1226.

4 *Ball*, in: Musielak (ed.), ZPO, 11. Auflage 2014, § 545 Rn. 7 m.w.N; *Roth*, Die Revisibilität ausländischen Rechts und die Klugheit des Gesetzes, NJW 2014, 1224, 1225; *Riehm*, Vom Gesetz, das klüger ist als seine Verfasser – Zur Revisibilität ausländischen Rechts, JZ 2014, 73, 75 (noting that such statement was issued outside the legislatory process). Moreover, sec. 560 *ZPO* would become redundant (because every statute could be an issue on appeal now), cf. *Thole*, Anwendung und Revisibilität ausländischen Gesellschaftsrechts in Verfahren vor deutschen Gerichten, ZHR 176 (2012), 15, 59; *Lorenz*, in: BeckOK BGB, Stand: 1.2.2014, Einl. IPR at note 87.

5 *Sturm*, Wegen Verletzung fremden Rechts sind weder Revision noch Rechtsbeschwerde zulässig, JZ 2011, 74, 77; in a similar sense already *Steindorff*, Das Offenlassen der Rechtswahl im IPR und die Nachprüfung ausländischen Rechts durch das Revisionsgericht, JZ 1963, 200, 203

6 *Sturm*, Wegen Verletzung fremden Rechts sind weder Revision noch Rechtsbeschwerde zulässig, JZ 2011, 74, 77; contra *Thole*, Anwendung und Revisibilität ausländischen Gesellschaftsrechts in Verfahren vor deutschen Gerichten, ZHR 176 (2012), 15, 62.

7 BGHZ 198, 14; BGH NJW 2014, 1244 (on the latter decision see *Krauß*, Anforderungen an die tatrichterliche Ermittlung ausländischen Rechts in Zivilverfahren, GPR 2014, 175).

8 BGHZ 118, 151; see *Kerameus*, Revisibilität ausländischen Rechts, ZZP 99 (1986), 166, 172 et seq.; *Dölle*, Bemerkungen zu § 293 ZPO, in: Festschrift für Nikisch, 1958, 185, 193.

procedural errors and errors concerning the application of foreign law one may view this as a review of foreign law by the back door.[1]

3. Party autonomy vs. development of the law

It has been mentioned that the development of the law and the uniformity of adjudication are paramount goals of the Federal Court of Justice. Those goals, however, conflict with an important overarching principle of civil procedure, namely party autonomy. Relevant legal problems may escape the judiciary because the parties settle the case before judgment can be handed down. Certain areas of law, such as insurance law, are particularly concerned: To avoid unwanted precedents, insurers mostly tend to settle a case or withdraw the appeal as soon as they realize that they are likely to lose.[2] As there is no attorney-general for civil cases in Germany, the Federal Court of justice is not in a position to provide guidance in such cases.

Until very recently, the appellant was in a position to withdraw the appeal without the respondent's consent until judgment is pronounced, sec. 565, 516 (1) *ZPO*.[3] The legislator has changed that with effect of 1 January 2014.[4] From now on a withdrawal of the appeal without the respondent's consent is only possible until the beginning of the oral hearing (sec. 565 (2) *ZPO*).

IV. THE SUCCESSFUL APPEAL ON POINTS OF LAW

Pursuant to sec. 562 (1) *ZPO*, to the extent the appeal on points of law is deemed justified, the contested judgment is to be reversed. That includes also factual findings of the lower court, provided that those findings were based on procedural errors. There are two possible ways to go forward:

(1) The matter may be remanded to the appellate court, which is to hear it once again and is to decide on it. The appellate court is to base its decision on the legal assessment on which the reversal of the judgment was based (sec. 563 (1) and (2) *ZPO*)[5] – a rare

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1 *Thole*, Anwendung und Revisibilität ausländischen Gesellschaftsrechts in Verfahren vor deutschen Gerichten, ZHR 176 (2012), 15, 56.

2 *G. Hirsch*, Revision im Interesse der Partei oder des Rechts?, VersR 2012, 929; *Fuchs*, Einschränkungen der Dispositionsmaxime in der Revisionsinstanz: Werden alle Ziele erreicht?, JZ 2013, 990, 992.

3 *Althammer*, Die Zukunft des Rechtsmittelsystems, in: Bruns/Münch/Stadler (eds.), Die Zukunft des Zivilprozesses, 2014, p. 87, 100 et seq.

4 See Gesetz zur Förderung des elektronischen Rechtsverkehrs mit den Gerichten vom 10.10.2013, BGBl. I, S. 3786. On the reform cf. *Fuchs*, JZ 2013, 990.

5 Example: BGH NJW 2004, 2736: referral to court of appeal which does not want to follow; judgment is again attacked; see BGH NJW 2007, 1227. On the point see generally *Bartels*, Grenzen der Bindungswirkung rückverweisender Revisionsentscheidungen, ZZP 122 (2009), 449-464; *Madaus*, Die Bindungswirkung zurückverweisender Revisionsurteile, ZZP 126 (2013), 269-294.

instance where German law adheres to the doctrine of binding precedent.[1] That would be the model of cassation.

(2) The powers of the Federal Court of Justice go beyond that: In case the judgment is reversed only due to a violation of the law, the Court may decide on the merits in application of the law to the situation of fact as established, and if in light of said situation the matter is ready for the final decision to be taken (sec. 563 (3) *ZPO*).

V. CONCLUSION

The Federal Court of Justice is widely being acclaimed for doing good legal work. The main problem consists in finding the right balance between the goal of doing justice in the individual case and the overarching aim of every Supreme Court to clarify and develop the law. The history of reforms of access to the Federal Court of Justice can be seen as a constant attempt to find the equilibrium; sometimes one aspect is given too much weight, sometimes the other. In Germany, traditionally, much weight has been placed on the goal of individual justice. However, in the last decade, the collective aspects of the revision were strengthened. The mere fact that a decision rendered by the appellate court is wrong does not suffice to open revision. The Federal Court of Justice reserved only a small loophole for cases which are so wrongly decided that they border on arbitrariness.

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RUSSIAN CRIMINAL LAW AT KAZAN UNIVERSITY: SCIENTIFIC TRADITIONS IN MODERN INTERPRETATION. KAZAN SCHOOL OF CRIMINAL LAW: TRADITIONS AND INNOVATIONS

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Abstract: The author defines a "scholars' school", which incorporates research into the theoretical problems of different subjects and directions, where continuity of legal ideas, conceptions, and academic views also take place as an inherent part of the picture, and the ideas are united by the names of their pioneers and successors. The author gives a detailed description of the Kazan School of Criminal Law at Kazan University and the university's proud history, beginning in the eighteenth century, in research in the sphere of criminal law. The traditions at the Kazan School of Criminal Law continued uninterrupted across time and continue still in the research and studies undertaken there by Russian legal scholars today. The author gives a broad view of the history of the scholars' researches, of who formed the basic terms in the doctrine of Russian criminal law and provided explanations for many of the legal issues debated. The contributions of those researchers is analyzed, with emphasis given to G.I. Solntsev and B.S. Volkov. The author offers his point of view on some works that, at the time, were underestimated by contemporaries.

Keywords: Russian law, criminal law, motive, Kazan University, G.I. Solntsev, B.S. Volkov

The term "school" in the sciences is not something that is given a formal definition. Occasionally, it is connected with the situation where in this or that field of science (including jurisprudence) comprehensive ideas are elaborated (in this case it is fairly suitable to talk about historical or comparative law schools, or about the development of a legal institute, e.g. the death penalty in criminal law). However, it is appropriate to talk about a particular school, a "scholars' school", one that unifies the research relatively differently in substance of and approach to scientific issues that can be traced by so-called "geographical-genealogical" marks (the attachment of certain scholars to a certain university or even a certain university department). At the same time, of course, it is about a relative continuity of this or that scientific view or concept, unified by the names of their creators who may be both pioneers (a.k.a. "spiritual" fathers) and successors.

The term "Kazan criminalist school" (as a broad term) has become well-known in academia in the broad sense mentioned above, uniting a variety of areas of criminal law, criminology, and penitentiary law science. And Kazan University has a reason for pride in this case. We need mention only such names as G.I. Solntsev, the author of the first course of general criminal law, whose ideas on criminal law were centuries ahead of his time (for example, his prevision of the necessity to consider legal entities as subjects of crime and of criminal liability), A.P. Chebishev-Dmitriyev, one of the first Russian criminalists of the sociological approach and trailblazer in Russian criminology, V.F. Gregorovich, among the first creators of Russian "prison-study" or penitentiary law, who always praised the idea of humanization of the execution of prison sanctions, A.A. Piontkovskiy (the father), who doubtlessly led the way in developing the idea of probation and conditional release, A.A. Piontkovskiy (the son), one of the most outstanding Soviet criminalists and author of the only Soviet–era course of criminal law on the study of crime, and also the author of the well-known works on the complicated problems of the general law theory, philosophy, and methodology of legal science (it is appropriate to mention that his monographs on the analysis of the philosophical heritage of Hegel devoted to his study of state and law received true international acknowledgement), B.S. Volkov, who devoted his life to the development of the mental element of the offense, guilt, and motives of crime, and V.P. Malkov, who is fairly the founder of multiple crime problem development.

It is gratifying to note that the traditions of the Kazan School of Criminal Law that were formed in pre-Soviet times, and maintained across the Soviet era, are still continued in post-Soviet Russia today. In the contemporary criminal law doctrine, a prominent place is taken by the student books on criminal law (both general and special parts) made by the collection of authors of the Criminal Law and Criminology Departments of Kazan University, and monographs on the fundamental problems of criminal law by such scholars as F.R. Sundurov (problems of punishment theory), B.V. Sidorov (problems of criminal behavior affect), I.A. Tarkhanov (problems of positive behavior promotion in criminal law), M.V. Talan (problems of economic crime counteraction), and other specialists of the department who fruitfully contributed to criminal law doctrine.

Of the scholars mentioned, a closer look will now be taken of two of them, and of their service to the science of criminal law – G.I. Solntsev and B.S. Volkov.

The views of G.I. Solntsev on criminal law are represented in his handwritten *General Criminal Law Course* of 1820.

Gavriil Il'ich Solntsev was born on 22 March 1786, in Radogoshch village, Dmitrovskiy county, Orel province, into the family of a priest and died on 26 November (according to some sources 29 November) 1866 in Kazan. He became an associate professor in 1815, professor in 1817, and dean of the moral and political sciences department and vice-rector in 1818; he was Rector of Kazan University from 1819–1920 and Kazan province public prosecutor from 1824–1844.

Solntsev did not change the career of a scholar and university head for the fate of a practical province official on his own decision. He was suspended from university work through the enterprise of a notorious reactionary, the Kazan district custodian M.L. Magnitskiy, for teaching natural law, spreading "the spirit of freethinking and falsehood" in his lectures, for "rebuttal of all the foundations of society and church", and even "republican" incipiencies.[1] Under pressure from Magnitskiy, Solntsev was put on trial in the university's court (1821–1823), where his lecture on natural law was adjudicated, with the result that the court ruled "to disbar him forever of the professor's title and nevermore to appoint him at any position at any educational institute"[2] (in 1823 Solntsev was appointed chairman of the Kazan criminal trial chamber, but he could not take up his responsibilities due to the outcome of his trial). As a province prosecutor, he was remembered by his peers as being incorruptible (as evidence, it is reported that Nicholas I, visiting Kazan in 1836, told Solntsev: "I have two suns in Russia: one is in the sky, the other one is you"[3]).

Despite the relatively short period of time of his working in legal science, Solntsev accomplished a great deal in the field, and it is not just about his rapid career progression at Kazan University (M.M. Speranskiy himself, based on personal observation, singled out only two professors – the famous natural scientist Karl Fuks and Solntsev).[4]

Solntsev's encyclopedic knowledge is startling (even among the professoriate of his time). He was chosen associate professor, cathedra of the law of ancient and modern "grand" nations (among the materials presented to the University Council, he submitted a self-written, historical-legal treatise in Latin that contained an overview of the law of ancient and modern nations; it is suitable to mention that according to the Council's report, he made a plenary speech in Latin on the necessary traits of legal practitioners). For receiving the status of professor, he introduced two handwritten works on Roman law. In 1816–1817, Solntsev taught courses in Roman law and general

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1 See: Feoktistov, Magnitskiy // Kazan calendar. 1869. p. 9.

2 See: Bulich. University court trial on prof. Solntsev during the time of Magnitskiy's custodianship // Scientific notes of Kazan University, 1864. Issue 1. Kazan. 1866. p. 287.

3 See: Ponomarev. One of the wonderful Russian women // Historical messenger. Vol. 28. 1887. p. 115.

4 See: Korf M. Life of Count Speranskiy. Saint Petersburg, 1861. Vol. 2. p. 190.

criminal German law (a bit later he broadened the content of these courses by adding the law of Eastern nations, Jews and Egyptians). In 1819, he began teaching "explanations on the constitutions of representative governments" and a course in "natural, private, public and people's Russian laws".

Unfortunately, Solntsev's major work as a criminalist, *General Criminal Law Course*, still has not received its proper valuation. That work was prepared by him for publication in 1820, but it was not published, as a consequence of the outcome of his trial, mentioned earlier. It was finally published in 1907 by virtue of Professor, of the Demidov's law lyceum, G.S. Feldshtein.[1] In the time since then, this issue has become a bibliographical rarity, and that is the most significant reason which explains why Solntsev's *Course* is not well known, and why G.I. Solntsev is underestimated as a Russian criminalist. It is impossible not to admit that this situation occurred because of N.S. Tagantsev's judgment made in his (own) timeless *Course*, "… the same way Solntsev who taught the general criminal law (by Grolman) in Kazan had no impact".[2] Of course, it is not rational to reproach the most significant representative of Russian criminal law science (the publication of Solntsev's handwritten *Course* took place five years after Tagantsev's *Course* was published). Unfortunately, that is the case when the immutable authority of N.S. Tagantsev continues to have an impact on the unfairness towards the legal scientific merits of Solntsev's work (even though in post-Soviet Russia his *Course* was reissued twice).

It should be noted that G.S. Feldshtein, in his foreword to Solntsev's *Course*, gives a fairly comprehensive description of his main views on criminal law. We shall limit ourselves to just some of the ideas of the *Course*, which remain relevant, which still retain their significance, 200 years after the *Course* was written and without which the history of the science of Russian criminal law would be incomplete.

First of all, the definition of a crime given by Solntsev cannot be described other than as delectable (and even, speaking frankly, surprising):

> Crime is an external, free action prohibited by the positive laws against the political equality and liberty of the whole state or particular citizens, causing the aspiring and lawful punishment after itself, or else crime is an external, free action prohibited by the positive laws directly or indirectly disturbing the safety and welfare of a state and its particular citizens and causing the lawful punishment of the criminal.[3]

It is both amazing and exciting that already at the beginning of the nineteenth century Solntsev gave a definition of a crime beyond the formal definition (we can recall

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[1] Russian criminal law expounded … by Gavriil Solntsev (Kazan, 1820). Issue under edition and with the introduction article by G.S. Feldshtein about G.I. Solntsev (Yaroslavl, 1907). According to Feldshtein, the manuscript of the *Course* was saved from destruction by S.M. Shpilevskiy, who acquired it "simultaneously with a pile of handwritten junk that had no value at the store of an old bookseller" (Feldshtein G.S. Mentioned work, p. IV).

[2] Tagantsev N. Russian criminal law. 1902. Vol. 1. p. 31.

[3] Russian criminal law expounded … by Gavriil Solntsev. p. 54.

that such a formal definition was given even in 1863 in the first course book of Russian criminal law by V.D. Spasovich) and linked criminality and punishability of an action to the existence of a material feature of a crime – its ability to cause harm to "the safety and welfare of a state and its particular citizens", i.e. speaking in a modern manner, to the social danger of certain actions recognized as a crime. It is highly valuable that an author makes the assertion that a crime harms the objects protected by law not only "directly", but also "indirectly". The second term represents the criminality of the actions, in which harming the law-protected interests was not the target of the criminal's behavior, but was a side effect (but what is important is that it should be an understandable result – "crime is a … free … action") of such actions. It should be mentioned that almost 200 years before the Criminal Code of Russia of 1996 included such an object of a crime as "rights and freedoms of a human", Solntsev in the same context was speaking about "political equality and liberty" as the object of crime.

Solntsev defined the formal feature of a crime as its forbiddance and punishability by the criminal law:

> Crime is an action committed against the criminal laws: consequently to qualify any action as a crime an existence and a knowledge of a criminal law is needed that will describe the action as a kind or a type of a crime. If something is not described by such law, then a crime cannot be attributed; for there is no reason for prosecution.[1]

Such stringency towards using the principle *nullum crimen sine lege* in Russian criminal legislation was made real only in the Criminal Code of the Russian Federation of 1996 (the inference that an analogy of crimes is forbidden in the Framework of USSR criminal legislation and Union republics of 1958 could be made only by interpretation of Article 7 of the Framework).

Finally, by a crime having the trait of "a free action" Solntsev understood such a feature as guiltiness (the action should be deliberate – "malicious" or committed by recklessness – "by negligence or by not being properly cautious"; "doing any harm to someone by an accident, without intention and in such way when no caution could be followed shouldn't be attributed as a crime"), and also a condition that a "person, who committed a crime … had an intellect and free will", because "in an absolute inaction of an intellect and highhandedness the committed actions cannot be attributed as crimes even though they caused harm to anyone".[2]

The attention of a modern lawyer is captured by Solntsev's position towards the criminal liability of legal entities. He called them "moral personalities" (*personal morales*) and explained them as "societies, *universitates, collegia, corpora*".[3] We have to mention

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[1] *Ibid.*

[2] *Ibid.,* p. 56.

[3] *Ibid.,* p. 72.

that Solntsev was an adherent of the idea that legal entities can be subjects of crime and criminal liability. "It goes without saying", he noted,

> that not an abstract term *society* commits a crime, but the particular members, who make up any kind of a moral personality: discoursing about these members, the ones who make up a moral personality, we may say that some society, for example a regiment, collegium, etc., violated some kind of a law and, therefore committed a crime as a society, *collegia, corpora*, etc. Those members assume that the society acted not for a lawful social aim, but for a different from this aim elusion and purpose interested only for them. Moreover there are such societies, established with revolutionary ideas or godlessness or superstition that by their purpose are against the government laws and thus are criminal societies … Therefore it wouldn't be a mistake to say that moral personalities i.e. societies can commit crimes and after that endure lawful punishment.[1]

It does not matter what our opinion is on that debatable question; we should agree that Solntsev's reasons are relatively rational and convincing even for modern times especially if we recall the efforts of international society in combating ecological or terroristic crimes, for example.

In Solntsev's *Course* the dawning of international criminal law can be found, especially in formularizing war crimes as a kind of (in modern terminology) international crimes. "Attributed as a crime against the enemy's patrials will be killing them unarmed in war time, killing women, infants, priests and elder people … killing the captives who are granted mercy … outraging women."[2] We should note that these lines were written almost 130 years before the famous Geneva Conventions were adopted. As we know, those Conventions launched the development of international humanitarian law that today is one of the foundations of modern international criminal law.

The range of scientific interests of Professor B.S. Volkov was broad, to say the least. Nevertheless, his most valuable contribution to criminal law theory was on the problem of the *mens rea* of the offense. His four most important monographs devoted to that problem, prepared and published in Kazan during his working career at Kazan University, were *The Problem of Will and Criminal Liability* (1965), *Motif and Crime Qualification* (1968), *The Deterministic Nature of Criminal Behavior* (1973, reissued in Moscow in 2004), and *Motives of Crimes (Criminal-Legal and Social-Psychological Research)* (1982). We shall limit ourselves to giving a brief description of the main ideas set down and established by the author in the mentioned works.

We will start with his monograph *The Problem of Will and Criminal Liability*, the major theses of which are the following:

- Formulating the question of the limits of criminal personality study. It may seem a banal question. But let us recall what the times were like. A.B. Sakharov,

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[1] *Ibid.,* p. 73.

[2] *Ibid.,* p. 77.

in his most distinguished work *Criminal Personality and the Causes of Crime in the USSR* (1961), for the first time (since the "sunset" of Khrushchev's "snowbreak") in Soviet criminal law science, went beyond the boundaries of looking at the criminal personality just as the subject of a crime and tried to take a broader – social-psychological – perspective of that problem. In the reviews on that work this aspect of research was harshly criticized. The monograph by Volkov mentioned earlier was the first in which the position of Sakharov was not only supported, but also additionally explored by using the psychological characteristic of a criminal for understanding the reasons for the committed crime and the sentencing;

- Volitional substance of the crime in inactivity. Inactivity was defined by the author as the equal volitional action of activity;
- Conscious recognition of illegality as an element of a criminal responsibility in a person's violation of specific prohibitions;
- Defining the motif and the purpose of a crime as the main features that make real the volitional substance of a crime including negligent offenses (we note that only one year before, a paragraph on the motif in respect of the purpose of a crime appeared in the *Course Book of Criminal Law* (1964));
- Admitting the causation of criminal behavior motives and from the wider aspect – causation (through motives) of will, which was the author's solution for the philosophical problem of determinism and responsibility;
- Using the theoretical heritage from pre-revolutionary (pre-Soviet) Russian criminal law science (Tagantsev, Foynitskiy, Spasovich, Vladimirov, Budzinskiy) to the speeches of famous Russian lawyers – Plevako, Andreyevskiy, and others.

Of course, as in any massive work, weaknesses can be found in his monograph (we can include here the devastating, as it was very common in those days, highly negative evaluation of the so-called "evaluative" guilt conception).

Let us proceed to the next work, *Motif and Crime Qualification*:

- The problem of the motif and crime qualification rivalry. The author admitted that in a criminal action the blending of motives is possible. And, according to him, in that case the main motif ("leitmotif") should be highlighted, and only it will have a meaning in qualification. In reality, it is not always so. Studying investigational practice and jurisprudence on crimes against life and health, for example, with the extremist tendency shows that the greatest difficulty is to prove the extremist motif. In many cases extremism (which existed in reality) "vanished" due to defining the motif as hooliganism, which caused a different qualification of the action. In that case, the existence of the extremist motif was accepted, but only as the additional, secondary motif. However, in that case, using the general psychological motivational theory, not only the rivalry between motives should be taken into account, but also the possibility of their equal compound. That motives may not contradict each other, but go together in one

crime (that statement is not only about the mentioned motives), therefore while defining the extremist and hooliganism motives the action still can be qualified as a crime against life and health with an extremist tendency;

- Studying (for the first time in Russian criminal law science) the motives of such crimes as malfeasance and hooliganism. The greatest attention in this work is paid to the characteristics of the motives of homicide. The majority of the author's recommendations have withstood the test of time. Except for only one – the jealousy motif evaluation and its meaning for homicide qualification.

At the same time, in the criminal law literature jealousy is unequivocally viewed as a base motif (what was seen in the content of criminal law, for example, in Article 136 of the Criminal Code of RSFSR 1926). Therefore, homicide committed with this motif was qualified (until the Criminal Code of RSFSR 1960 was adopted) as a homicide with aggravating circumstances. In Article 136, a clause stated that a homicide of jealousy could be qualified as under Article 138 of the Criminal Code (homicide in temporary insanity). In criminal law theory (especially after the adoption of the Criminal Code of 1960, which excluded the homicide of jealousy from the list of homicides with aggravating circumstances), the question was raised whether jealousy should be defined as a mitigating circumstance, and thus a homicide with this motif should be qualified as a homicide in temporary insanity if it was caused by the spouse's infidelity. The doctrinal definition categorically rejected such a possibility. For the first time, E.F. Pobegaylo spoke up against such an idea in his work "Deliberate homicides and combating them".[1]

B.S. Volkov did not support that point of view and joined the traditional point of view:

> Jealousy is an egoism manifestation in the relationships between people and despite the fact whether that motif is based on the real or imaginary grounds, in all cases it is a base motif. Condition of an affect, caused by jealousy in such cases is not a result of the victim's behavior, but is a consequence of the painful egoism, selfishness and cranky vanity.[2]

Several years passed, the moral changed, and accordingly changed the jurisprudence.

We will move on to the next work by Volkov, *The Deterministic Nature of Criminal Behavior*, which has the following characteristics:

- A systems-based approach to the problem. The most difficult and at the same time practically significant and theoretically interesting questions have been considered: moral and ethical assessment of a person's motives and socially dangerous acts committed on their basis; the ratio of fault and causality; a ratio

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[1] Pobegaylo E.F. Deliberate crimes and combating them. Criminal legal and criminological research / Edited by V.V. Trufanov. Voronezh: Voronezh University Publishing House, 1965, p. 165.

[2] Volkov B.S. Motive and crime qualification / Edited by F.N. Fatkullin. Kazan: Kazan University Publishing House, 1968, p. 102.

of other components of the objective and subjective elements (and not only in respect of their traditional distinction, but also from the aspect of their compliance and dependence on each other);

- A conscious role in criminal responsibility (this is possible if the person had an opportunity to realize a social sense and the objective importance of the committed acts and was capable of regulating his behavior; a distribution of this conclusion to negligence: let us remember at that time the well-known works of P.S. Dagel did not yet exist);
- The proposal of the author in fault determination is to emphasize its social aspect (the consciousness of a social sense of the acts committed by the person);
- The denial of the exaggerated value of legal bans knowledge as nearly the main issue in crime prevention;
- Finding of dependence of objective and subjective elements in a concrete crime: of purpose and manner, of motive and manner, of causality and fault;
- A warning of inadmissibility of revaluation of a method of statistical patterns in substantiation of the determinism principle and freedom of human behavior;
- Drawing attention to the problem of a ratio of the social and biological issues in the structure of the offender's personality, neither exaggerating nor also denying a role of the last factor.

And at last, we will consider the work *Motives of Crimes (Criminal-Legal and Social-Psychological Research)*. On the one hand, this famous monograph is some kind of finale to the author's research on the motive of crime problem, but, on the other hand, it significantly develops the provisions on this subject considered by the author in the previous books (especially, it concerns the criminological maintenance of the problem). The author identified and exposed the following aspects of the problem investigated by him:

- moral and ethical assessment of the motive and the acts caused by it;
- social conditionality of motive and selective nature of antisocial behavior; a ratio of motive of crime and offender's personality;
- classification of motives of crimes;
- the contents and form of motives manifestation;
- motive and basis of criminal responsibility (motive and a determination of fault and its social essence; a ratio of motive and objective elements of an *actus reus*; motive and circumstances which exclude public danger; motive and stages of offenses; motive and complicity in crime);
- establishment of motive and prevention of crimes.

Summing up the result, one may say that B.S. Volkov created the developed theory of motive of crime and motivation of criminal activity for the first time during the Soviet period of the domestic science of criminal law. And on this basis alone he earns his rightful and permanent place in the domestic science of criminal law.

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COMMENTS

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COMPARATIVE LEGAL ANALYSIS OF RESPONSIBILITY FOR THE COMMISSION OF COMPUTER CRIMES IN THE CRIMINAL LAW SYSTEMS OF RUSSIA AND FOREIGN COUNTRIES

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Abstract: This article examines the criminal law legislation of Russia and foreign countries that provides for liability for the commission of computer crimes. Comparative legal analysis is performed at the level of national criminal law systems (Russia, USA, China, France, Germany, et al.) and at the level of legal families: the Anglo-American (UK, USA), Romano-Germanic (France, Russia, Germany, Italy, et al.), the Scandinavian (Sweden, Denmark), socialist (China). Criteria for comparative legal research were: the source of law stipulating the criminal responsibility for the commission of computer crimes as well as objective and subjective signs of a crime. The article achieves several goals of scientific research. The cognitive goal is the study of the criminal law of Russia and foreign countries that regulates liability for the commission of computer crimes. The informational goal is to present legally relevant information on the criminal law legislation of Russia and foreign countries that provides for liability for the commission of computer crimes. The analytical goal is to conduct a comprehensive analysis of criminal law legislation of Russia and foreign countries, fixing liability for the commission of computer crimes, to identify its peculiarities and development trends. The integrative

goal is to determine the possibility of harmonization and approximation of criminal law legislation of Russia and foreign countries that regulates liability for the commission of computer crimes. A critical goal is to identify gaps in the legal regulation of responsibility of guilty persons for committing computer crimes in the criminal law legislation of Russia and foreign countries.

Research methods. The study uses the dialectical method on the basis of which phenomena and concepts are determined comprehensively, in conjunction with public relations, and it makes use of historical and legal, formal-legal and comparative legal methods.

Results. The authors identify the advantages and disadvantages of Russian legislation regarding the criminalization of computer crimes. They put forward proposals for the improvement of criminal law Articles 272–274 of the Russian Criminal Code. The authors arrive at the general conclusion of a trend towards "hybridization" of national criminal law systems, which finds its expression in the normative consolidation of separate (special) offenses for the commission of criminal acts in the field of computer information in Russian and foreign legislation.

Keywords: computer crime, criminal law, criminal liability, criminal law system, legal system

Contemporary criminal law legislation as a structural element of the criminal law systems in Russia and foreign countries is inseparably connected with such factors as the operation of national legal systems, matter and structure of the sources of law, existing jurisprudence, public consciousness and legal culture, and national mentality, among others.

As stated by Professor O.N. Vedernikova, the main types of the existing criminal law systems are just a manifestation of law systems in general; as a result she marks out Romano-Germanic, Anglo-American, Muslim, socialist and post-socialist types of criminal law systems.

As a basis for defining these types of criminal law systems, Professor Vedernikova uses "analysis of three parts that create a system of criminal law:

(a) criminal law doctrine that represents the legal culture of a country or region;

(b) criminal law provisions set by government officials;

(c) application of the law aimed at implementation principles, goals and objectives of criminal law."[1]

According to Professor A.V. Naumov, nowadays "with a certain amount of conventionality we can point out several main systems of criminal law as the development

[1] O.N. Vedernikova. *Sovremennye ugolovno-pravovye sistemy: tipy, modeli, harakteristika* [Contemporary systems of criminal law: types, models, characteristics] // *Gosudarstvo i pravo = State and Law*. 2004. № 1. p. 68–76.

of the national legal systems: (1) Romano-Germanic; (2) Anglo-American; (3) socialist; (4) Muslim". At the same time, this classification is based on R. David's classification of legal systems. Criteria on which this classification is based consists of two parts: criteria of the source of law (on which the Romano-Germanic criminal law system differs from the Anglo-American) and ideological criteria (on which Romano-Germanic and Anglo-American systems differ from socialist and Muslim systems).[1]

Meanwhile, Professor G.A. Yesakov puts forward that due to the peculiarities of the historical development of law in general and the development of criminal law in particular in any country with its criminal law system (as long as it can be referred to one of the criminal law systems) a certain concept dominates. That concept is versatile: it represents the aims of the specific criminal law system, sets the structure and sometimes even the constituent elements of the criminal law system; it is usually subliminal and intangible, but at the same time exists in reality; it consolidates the society in its attitude toward criminal law, offering protection to the values cherished by the nation, and represented with a certain degree of preciseness in a written form. In very general terms, that concept is about defining who (or what) is dominant in criminal law. There are five alternatives: person, law, God, society, family. Therefore, on the basis of these dominant ideas we can mark out criminal law systems of common law, continental law, religious law, personal law and customary law.[2] At the same time Professor Richard Frase from the University of Minnesota Law School asserts that the existing theories are unable to explain the changes happening in criminal law systems all over the world. The changes happen so quickly that dogmatic theory cannot keep up with them. Therefore, it is reasonable to look at the dynamics of the development of law systems, at their functioning, at the similarities and differences that become apparent while carrying out special operations. Professor Frase marks out three criminal law models within Western legal systems. Two of them are classic ones: the common law model and the civil (Roman) law model. The third one is hybrid or a mixed model. Nowadays, Frase says, classic models exist only in theory, because a process of "hybridization" is gaining momentum.[3]

Without doubting the existing theories stated above, we suggest that in criminal law, science has developed two approaches to defining and classifying criminal law systems.

On one side there exists a waiver from using any typology, instead using comparative legal study of individual norms and institutes of criminal law irrelative to a particular legal system. On the other side the criteria for criminal law systems typology are offered according to existing criteria of law systems typology developed by comparative law science.

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[1] A.V. Naumov. *Rossijskoe ugolovnoe pravo. Kurs lekcij. V dvuh tomah. T. 1. Obshhaja chast'* [Russian criminal law. Lecture course. In two volumes. V.1. General part]. 3-e izd., pererab. i dop. M., 2004. – p. 451.

[2] G.A. Esakov. *Osnovy sravnitel'nogo ugolovnogo prava: Monografija* [Basics of contemporary criminal law: Monography]. — M.: OOO «Izdatel'stvo "Jelit"», 2007. – p. 152.

[3] Richard S. Frase. Comparative criminal justice policy in practice / Comparative criminal justice system: From diversity to rapprochement. Toulouse - France, 1998. – p. 109–112.

We suggest that analysis and the following comparative legal study of criminal legislation that provides for liability for the commission of computer crimes might begin with the Anglo-American legal system and the criminal law systems of the USA and Great Britain.

The **United States of America** is one of the first countries in the world to take steps to establish criminal liability for computer crimes, and at the same time it is a country where computer crime appeared earlier than in other countries. The distinctive feature of American criminal law legislation is its two-level structure: federal legislation and the legislation of individual states.

At the national level, a draft bill on protection of federal government computer systems was developed in 1977. It introduced criminal liability for such acts as knowingly inputting false data into a computer system, illegal use of computer devices, altering of information processing and its disruption, robbery of cash, securities, property and services as well as valuable information committed by computer technology capabilities or by using computer information. On the basis of this bill, in 1984 a law on computer fraud was adopted. Over time, and repeatedly amended (in 1986, 1988, 1989, 1990, 1994, 1996 and 2000),[1] it has become the main legal act providing for criminal liability for unlawful access to computer information. Today, the Computer Fraud and Abuse Act is embodied in U.S. Code Title 18 § 1030.[2] It should be noted that this law established liability for violations, the instrument of which is a "protected computer" (and the information it holds). This term means:

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.[3]

At the same time, the law states that criminal liability is applicable in cases of:

1. Unauthorized access – when a person not authorized access to a computer or a computer system gains such access and obtains information determined to require protection against unauthorized disclosure; and

2. Exceeding authorized access – when a lawful user accesses a computer or a computer system and uses the access to obtain or alter information that he is not authorized to obtain or alter.

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[1] A.G. Volevodz. *Protivodejstvie komp'juternym prestuplenijam: pravovye osnovy mezhdunarodnogo sotrudnichestva* [Counteraction to computer crimes: legal foundation of international cooperation] / A.G. Volevodz. – M.: OOO Izd-vo «Jurlitinform», 2002. – p. 88.

[2] Federal Criminal Code and Rules / Title 18 – Crime and Criminal Procedure – § 1030 Fraud and related activity in connection with computers – (amendment received to February 15, 1999), West Group, St. Paul, Minn., 1999.

[3] ibid., subsection (e)(2).

Because of the fact that this study is devoted to computer crimes, we should pay attention to this law, and U.S. Code Title 18 § 1029 and § 1030 in particular, which are part of Chapter 47 – Fraud and False Statements.

Subsection (a) of § 1030 provides for liability for crimes that are directly or indirectly related to the creation, use or dissemination of malware. Criminal responsibility extends to whoever:

(1) commits espionage by unauthorized access, or exceeding authorized access, to information, and also obtains information related to national defense, international relations, or atomic energy programs;

(2) commits unauthorized access, or exceeds authorized access, to information from any department or agency of the United States, any computer related to interstate and international trade, any protected computer, and also obtaining information contained in a financial record of a financial institution, or of a card issuer, or contained in a file of a consumer reporting agency on a consumer;

(3) accesses a computer of that department or agency that is exclusively for the use of the Government of the United States or, disruption of such computer's functioning;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any one-year period;

(5) intentionally or recklessly causes damage to protected computers;

(6) knowingly and with intent to defraud traffics in any password or similar information through which a computer may be accessed without authorization, if such trafficking affects interstate or foreign commerce; or such computer is used by or for the Government of the United States;

(7) threatens, extorts, blackmails or commits other offenses with the use of computer technologies.[1] [2]

Sanctions for committing the crimes described in § 1030(a) are harsh. Up to 10 years imprisonment for almost all those crimes mentioned and up to 20 years in case of recidivism or obtaining classified information. At the same time, the sanctions include a fine and one-year imprisonment as the lowest limit in the event the commission of the crime is the first such offense or there are mitigating circumstances.

U.S. Code Title 18 § 1029 establishes liability for whoever:

– creates, uses and trades counterfeit access devices;

– uses or receives devices for unauthorized access with intent to receive financial benefit not less than $1,000;

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[1] USA Patriot Act of 2001, in the sphere of computer criminality and electronic evidence, URL: http://www.crime-research.ru/articles/PatriotAct/4 (in Russian) (last visited May 8, 2017).

[2] United States Code Title 18, Part 1, Chapter 47, §1030 Computer Fraud and Abuse Act (CFAA), URL: http://www.law.cornell.edu/uscode/text/18/1030 (last visited May 8, 2017).

– possesses fifteen or more devices which are counterfeit or unauthorized access devices;

– makes a transaction with the access device of another person;

– makes an unauthorized offer of sale to a third person of access devices or information used for obtaining access devices;

– uses, creates, sells or possesses a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services;

– knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization;

– forces another person to present to the member or its agent, for payment, one or more piece of evidence or records of transactions made by an access device.[1]

Thus, we can see that US legislation includes detailed regulations on liability for computer crimes and that it establishes harsh punishment at all stages of the crimes: preparation, attempt and completion of the criminal action.

Moreover, the disposition of the criminal law sections includes not just computer information as the direct object of the crime, but also other important spheres of government activity and people's lives as the facultative objects: the operations of the departments of the state and financial entities, telecommunications and related facilities, national defense, state secrets, personal data, confidential business information, etc. This makes the process of qualifying computer crimes easier in terms of bringing the violator to justice.

Nevertheless, US federal criminal legislation does not contain special sections that establish liability for the creation, use or dissemination of malware or computer viruses (in contrast to Russia, where such norms exist).

In the **United Kingdom of Great Britain and Northern Ireland** (the UK) sufficient attention is paid to the legal regulation of criminal liability for computer crimes. For instance, the Computer Misuse Act of 1990 establishes criminal liability for several violations:

(1) intentional unlawful access to a computer or the computer data or programs it holds (Art. 1);

(2) intentional unlawful access to a computer or computer data or programs it holds with intent to commit an offense to which this section applies (Art. 2);

(3) unlawful access to computer information on a particular computer or computer system with intent or if such access led to damage, blocking, modification, copying of information or disruption of the computer or computer system operation (Art. 3).[2]

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[1] Federal Criminal Code and Rules / Title 18 – Crime and Criminal Procedure – § 1029 Fraud and related activity in connection with access devices – (amendment received to February 15, 1999), West Group, St. Paul, Minn., 1999.

[2] Computer Misuse Act 1990. - First Published 1990, Reprinted in the United Kingdom by The Stationery Office Limited. – London, 1997. – p. 14.

The interesting innovations of this Act are the norms that UK jurisdiction covers all the mentioned offenses if any element of the crime was performed on national territory, i.e. if the crime was committed or the consequences took place on British territory, the crime is supposed to have been consummated in Great Britain (Arts. 4–7).

The Data Protection Act of 1998 has a number of provisions on computer information security, in particular protection of personal data from criminal assault.[1] This Act regulates automated processing of personal data both in public and in private sectors. Criminal liability is established for:

– intentional collection and obtaining of personal data by violation of computerized records in a data protection registry;

– sale of personal data that have been or will be acquired illegally.

By the decision of a magistrate's court the violator may be sentenced to a fine of £5,000. By the decision of a coroner's court (for more serious offenses) the violator may be sentenced to unlimited fine or imprisonment. These courts may order the confiscation or deletion of any data linked with the particular offense.[2]

Moreover, the Terrorism Act of 2000 prescribes that illegal interference with computers, computer systems or networks that causes significant damage or the obtained computer information is used for organizing mass violent riots, may be equated to terrorist acts, and thus lead to increased responsibility.[3]

As part of this comparative study, it seems logical to continue with the criminal law systems of **Sweden, Denmark and Finland**, which are the examples of the **Scandinavian legal system**.

The development of the legislation of foreign countries shows that the first step in the protection of computer information was made not by the USA, but by Sweden where on April 4, 1973, the "Data Law" was adopted. This law introduced a new term to the legislation – "misuse of a computer".[4]

Today, the Swedish Penal Code does not have a specific norm that provides for liability for computer crimes, but to some extent such violation is punishable under Section 9c, Chapter 4 of the Code, which states:

A person who, in cases other than those defined in Sections 8 and 9, unlawfully obtains access to a recording for automatic data processing or unlawfully alters or erases or inserts such a recording in a register, shall be sentenced for breach of data secrecy

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[1] Data Protection Act 1998. - First Published 1998, Reprinted in the United Kingdom by The Stationery Office Limited. – London, 1999. – p. 95.

[2] V.P. Ivanskij. *Pravovaja zashhita informacii o chastnoj zhizni grazhdan. Opyt sovremennogo pravovogo regulirovanija: monografija* [Legal protection of information about the private life of citizens. Experience of modern regulation: monography] / V.P. Ivanskij. – M.: Izd-vo RUDN, 1999. – p. 69–70.

[3] Terrorism Act 2000. - First Published 2000, Reprinted in the United Kingdom by The Stationery Office Limited. – London, 2000. – p. 34.

[4] *Zakonodatel'nye mery po bor'be s komp'juternoj prestupnost'ju* [Legislative measures for computer crimes] // *Problemy prestupnosti v kapitalisticheskih stranah stranah = Problems of crime in the capitalist countries*. – 1988. - № 10. – p. 40.

to a fine or imprisonment for at most two years. A recording in this context includes even information that is being processed by electronic or similar means for use with automatic data processing. [Law 1998:206][1]

If such violation is committed for remuneration, then Section 1, Chapter 9 of the Code is applicable:

If a person by deception induces someone to commit or omit to commit some act which involves gain for the accused and loss for the deceived or someone represented by the latter imprisonment for at most two years shall be imposed for fraud.

A sentence for fraud shall also be imposed on a person who, *by delivering incorrect or incomplete information, or by making alterations to a program or recording or by other means, unlawfully affects the result of automatic data processing or any other similar automatic process so that gain accrues to the offender and loss is entailed by any other person*. [emphasis added] [Law 1986:123]

The Danish Criminal Code also does not contain special sections on the liability for the commission of computer crimes, but the one who is found guilty of such offenses may be punished under § 193 and § 279a. These sections stipulate:

§ 193. Any person who in an unlawful manner, causes major disturbances in the operation of public means of transportation, of the public mail services, of publicly used telegraph or telephone services, of radio and television installations, of information systems or of installations for the public supply of water, gas, electricity or heating shall be liable or to imprisonment for any term not exceeding four years or with regard to mitigating factors to a fine.

If such an act has been committed through gross negligence, the penalty shall be a fine or imprisonment.

§ 279a. Any person who, for the purpose of obtaining for himself or for others an unlawful gain, unlawfully changes, adds or erases information or programs for the use of electronic data processing, or who in any other manner attempts to affect the results of such data processing, shall be guilty of computer fraud.[2]

Under Chapter 30, Section 4 of the Finnish Criminal Code, unauthorized accessing of an information system protected against unauthorized persons is set down as a modus operandi for committing business espionage (unlawfully obtaining data regarded as a business secret).[3]

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[1] *Ugolovnyj kodeks Shvecii* [Criminal Code of Sweden] / *Nauchnye redaktory prof. N.F. Kuznecova i kand. jurid. nauk S.S. Beljaev. Perevod na russkij jazyk S.S. Beljaeva* [Scientific editors Professor N.F. Kuznecova and Candidate in Legal Sciences S.S. Beljaev. Translation to Russian made by S.S. Beljaev]. — SPb.: *Izdatel'stvo «Juridicheskij centr Press» = Publishing house*, 2001.

[2] *Ugolovnyj kodeks Danii* [Criminal Code of Denmark] / *Nauchnoe redaktirovanie i predislovie S.S. Beljaeva, kand. jurid. nauk (MGU im. M.V. Lomonosova). Perevod s datskogo i anglijskogo kand. jurid. nauk S.S. Beljaeva, A.N. Rychevoj* [Scientific editing and preface by S.S. Beljaev, Candidate in Legal Sciences (Lomonosov Moscow State University). Translation from Danish and English prepared by S.S. Beljaev and A.N. Rychevoj]. — SPb.: *Izdatel'stvo «Juridicheskij centr Press» = Publishing house*, 2001.

[3] *Ugolovnyj kodeks Finljandii [Jelektronnyj resurs]* [Criminal Code of Finland [Electronic resource] // URL: http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf (last visited May 10, 2017).

Next in our study, we should turn our attention to the criminal law systems of **France and Germany**, which represent the **Romano-Germanic legal system**.

At the meeting of the European Union Committee of Ministers on September 13, 1989, a list of computer misdemeanors was adopted based on which the European legislator was to develop and establish the corresponding criminal legal acts. In full, this includes "a minimum and an optional list of offenses".

"Minimum list of offenses" includes eight types of computer crimes: computer fraud, computer forgery, damage to computer data or computer programs, computer sabotage, unauthorized access, unauthorized interception, unauthorized reproduction of a protected computer program, and unauthorized production of a topography.

"Optional list of offenses" includes four types of computer crimes: alteration of computer data or computer programs, computer espionage, unauthorized use of a computer, and unauthorized use of a protected program.[1]

Thereafter, special laws establishing criminal liability were adopted not later than 1995 in such countries as France, Germany, Austria, the Netherlands and Portugal.

For example, in Germany the Security Assessment Act was adopted in 1994.[2] Moreover, several computer crimes were included in the German Criminal Code. The Code establishes responsibility for whoever:

– unlawfully obtains data that are stored or transmitted electronically or magnetically or otherwise in a manner not immediately perceivable, for himself or another, data that were not intended for him and were especially protected against unauthorized access, if he has circumvented the protection (§ 202a);

– produces, falsifies or uses a counterfeit technical record, a technical record meaning a presentation of data, in whole or in part, produced automatically by a technical device (§ 268);

– counterfeits data that have probative value (§ 269);

– destroys, modifies or withholds technical records (§ 274);

– unlawfully annuls, destroys, disrupts or distorts data (§ 303a);

– distorts data processing by destroying, damaging, disabling, or disables data carriers (§ 303b).

Also among the crimes that are committed in cyberspace we should note the violation of telecommunications secrets (§ 206) and the disruption of telecommunications facilities (§ 317) in the German Criminal Code.

Chapter 22 of the German Criminal Code, "Fraud and embezzlement", includes § 263a "Computer fraud", under which an intentional violation with intent to achieve for himself or a third person material benefit is understood. Its modus operandi is damaging the property of another by influencing the result of a data processing operation through

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[1] V.D. Kurushin, V.A. Minaev. *Komp'juternye prestuplenija i informacionnaja bezopasnost'* [Computer crimes and information security] / V.D. Kurushin, V.A. Minaev - M.: Novyj Jurist, 1998. – p. 96–97.

[2] Geandert durth Art. 126 vom. 14/9.1994. (BGBIIS 2325).

incorrect configuration of a program, use of incorrect or incomplete data, unauthorized use of data or other unauthorized influence on the course of the processing.

For committing the crimes mentioned above, alternative sanctions are established, which include two types of punishment: limited time imprisonment (§ 303a – up to two years, §§ 202a to 206 – three years, §§ 263a, 268, 269, 274, 303b, 317 – five years) and fine.[1] Regarding this feature of the German Criminal Code, it should be noted that sections that establish liability for computer crimes are not unified in one chapter, but are supplementary to the existing ("classic") crimes, included in the same chapters with them and differentiated only in the elements of the crime: the object of the offense, the modus operandi, the instrument of the offense, etc. For example, § 202a is a special norm to § 202 "Violation of the privacy of the written word". These sections are included in Chapter 15 "Violation of privacy", have the same object "Privacy", and differ only in the instrument of the offense: in § 202 – another person's post mail and documents, in § 202a – data carriers or data held inside the data carriers.

The construction of the German Criminal Code is pragmatic enough, so it facilitates the qualification of crimes.

A similar approach to liability in respect of computer crimes exists in the **criminal law legislation of France**.

The French Penal Code that entered into force in the spring of 1994 consists of four volumes. Chapter 6 of the second volume contains articles that establish liability for infringement of human rights linked with using computer data (e.g. Art. 226-18–226-19):

– illegal acquisition and processing of data (Art. 226-18);

– inputting and keeping data forbidden by law in a computer (Art. 226-19).

Besides the articles mentioned, the second volume of the French Penal Code includes norms that prescribe liability for attacks on automated data processing systems (Art. 323-1–323-4):

1. Fraudulently accessing or remaining in all or part of an automated data processing system (Art. 323-1);

2. Obstructing or interfering with the functioning of an automated data processing system (Art. 323-2);

3. The fraudulent introduction of data into an automated data processing system or the fraudulent deletion or modification of the data that it contains (Art. 323-3);

4. Participating in a group or conspiracy established with a view to the preparation of one or more offenses set out under Articles 323-1 to 323-3 (Art. 323-4).

Chapter 3, Volume 4 of the French Penal Code, "Offenses against the Nation, State and Public Order", also contains articles that directly or indirectly provide for liability for the creation, use or dissemination of malware:

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[1] *Ugolovnyj kodeks FRG* [Criminal Code of Germany]. – M.: Zercalo, 2000. – 208 s.; *Ugolovnyj kodeks Germanii s izmenenijami ot 28 dekabrja 2003 goda. [Jelektronnyj resurs]* [Criminal Code of Germany with changes from 28 December 2003 [Electronic resource]] URL: http://lexetius.com/StGB/263a (in German) (last visited May 17, 2017).

– collection and transmission of information in computer memory to a foreign country; destroying, theft, withdrawal and copying of national defense secret data that is in computer memory and also the acquaintance of a third person with this data (Arts. 411-7, 411-8, 413-9, 413-10, 413-11);

– destroying, distortion or theft of any document, machine, construction, equipment, installation, apparatus, technical device or computerized system, or rendering them defective, where this is liable to prejudice the fundamental interests of the nation. This offense is qualified as sabotage (Art. 411-9);

– terrorist acts linked with violations in the sphere of computer science (Art. 421-1).[1]

Among the peculiarities of the French Penal Code in respect of the regulation of computer crimes, also linked with the creation, use or dissemination of malware, it should be noted that not only individuals, but also legal persons can be brought to justice. This is established in the sanctions of the Penal Code, and the punishment may be different, dependent on the status of the legal person.

In our opinion, the **socialist legal system**, and **the Chinese criminal law system** as its clearest representative, has scientific interest as a part of the research.

In analyzing the criminal law legislation of foreign countries, we should pay extra attention to China – a country that is number one in world population and that had recently been number one in the creation, use or dissemination of malware. The strict and sound policy of China in the sphere of computer information protection and prevention of computer crimes over the last three years has decreased the number of computer crimes. An important role has been played by the national criminal law legislation, which sets down harsh punishments for these kinds of crimes.

The Chinese Criminal Code establishes the following crimes in the sphere of computer information and information technology (IT):

Article 285. Whoever violates state regulations and intrudes into computer systems containing information concerning state affairs, construction of defense facilities, and sophisticated science and technology is to be sentenced to not more than three years of fixed-term imprisonment or detention.

Article 286. Whoever violates state regulations and deletes, alters, adds to or interferes in computer information systems, causing abnormal operations of the systems and grave consequences, is to be sentenced to not more than five years of fixed-term imprisonment or detention; when the consequences are particularly serious, the sentence is to be not less than five years of fixed-term imprisonment.

Whoever violates state regulations and deletes, alters or adds to the data or application programs installed in or processed and transmitted by computer information systems, and causes grave consequences, is to be punished according to the preceding paragraph.

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[1] *Novyj Ugolovnyj kodeks Francii* [New Criminal Code of France] / Ed. by N.F. Kuznecovoj, Je.F. Pobegajlo. – M., 1994. – p. 265.

Whoever deliberately creates and propagates computer viruses and other programs which sabotage the normal operations of computer information systems and causes grave consequences is to be punished according to the first paragraph.

Article 287. Whoever uses a computer for financial fraud, theft, corruption, misappropriation of public funds, stealing state secrets or other crimes is to be tried and punished according to relevant regulations of this law.[1]

In making a comparative study analysis of criminal law systems and legislation regarding criminal liability for computer crimes, it should be remarked that on November 23, 2001, the Convention on Cybercrime in the sphere of computer information technologies was adopted in Budapest by the Council of Europe.[2] The Convention contains a list of computer-linked offenses that are to be criminalized in the legislation of Member States and other State signatories. At the moment, forty-seven countries, including such non-European states as the USA, Canada and Japan, have ratified the Convention.

For a number of political and legal reasons (e.g. the commitment by some Member States to the Convention, such as the USA and other NATO members, to grant Russia free access to informational resources) **Russia** has not yet ratified the Convention. Still, the Convention has had a serious impact on the further development of Russian criminal law legislation that prescribes criminal liability for computer crimes.

In studying the Russian criminal law system and legislation that establishes punishment for the commission of computer crimes, it should be pointed out that the turning point in counteracting computer crime was the entering into force on January 1, 1997, of the Russian Criminal Code. The new code criminalized the main dangerous acts to society in this sphere, as the need to fight them was understood at that moment.

The Russian legislator, unlike the European, American and Chinese legislator, introduced a special Chapter 28 "Crimes in the sphere of computer information" in the new criminal code. This chapter contains three articles that establish criminal liability for the following crimes:

Article 272 "Illegal access to computer information";

Article 273 "Creation, use and dissemination of harmful computer programs";

Article 274 "Violating the rules for operation of the facilities for computer information storage, processing and transmittance and of information-telecommunications networks".[3]

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[1] *Ugolovnyj kodeks Kitajskoj Narodnoj Respubliki* [Criminal Code of the People's Republic of China] / Ed. by Doctor of Legal Sciences prof. A.I. Korobeeva, translation from Chinese by D.V. Vichikova. — SPb.: *Izdatel'stvo «Juridicheskij centr Press» = Saint Petersburg: Publishing House*, 2001. S.191-192.; *Ugolovnyj kodeks Kitajskoj Narodnoj Respubliki [Jelektronnyj resurs]* [Criminal Code of the People's Republic of China]. – URL: http://www.asia-business.ru/law/law1/criminalcode/code/#6 (in Russian) (last visited May 10, 2017).

[2] Convention on criminality in the sphere of computer information (ETS N 185) (signed in Budapest on November 23, 2001).

[3] *Ugolovnyj kodeks Rossijskoj Federacii: federal'nyj zakon ot 13 ijunja 1996g. № 63 – FZ* [Criminal Code of the Russian Federation: federal law from 13 June 1996 № 63-FL] // *Sobranie zakonodatel'stva Rossijskoj Federacii = Collection of legislation of the Russian Federation*. 1996. № 25.

Worthy of mention is that on February 17, 1996, at the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS) VII plenary meeting, the "Model Criminal Code" was adopted. The Code includes Section XII "Information Safety Crimes", which contains a number of commitments, such as: Article 243 "Computer technology using theft", Article 286 "Computer information unauthorized access", Article 287 "Computer information modification", Article 288 "Computer sabotage", Article 289 "Computer information illegal occupation" and Article 290 "Special sources producing and marketing for computer systems or software access obtainment".[1]

As seen from this list, in the "Model Criminal Code" the various possibilities for preventing, stopping and revealing illegal access in respect of computer information and information software are presented rather more comprehensively. Nevertheless, Russia and the majority of the CIS Member States did not use this "universal Criminal Code" created through the many efforts of legal experts. Among the twelve countries of the CIS, only Belarus (and Russia partly) used the norms of this draft law in their national legislation. Many amendments and changes were included in Articles 272–274 of the Russian Criminal Code. The most recent ones were made by Federal Law № 420 of December 12, 2011 "On amending the Criminal Code of the Russian Federation and certain legislative acts of the Russian Federation". This law made significant changes in Articles 272–274. In particular, the sanctions for committing crimes in the sphere of computer information have been intensified (up to seven years of imprisonment). Dispositions of Articles 272–274, legal terminology, qualified and extra-qualified elements of the offense, have been transformed drastically; and the definition of "computer information" and the amount of major damage were established in a note referring to Article 272.

The novel step in the development of Russian criminal law legislation (with respect to the subject under study) was made by Federal Law № 207 of November, 29, 2012. The law established several new crimes, in Chapter 21 "Crimes against property", among which a number of computer crimes can be noticed: fraud, through the use of payment cards (Art. 159.3), fraud, in the sphere of computer information (Art. 159.6).

As a result, Russian law enforcement agencies gained extra legal tools in fighting computer fraud that involves computer information, as well as in fighting other ways of creating, keeping, processing and sharing computer information and payment cards for the purpose of committing theft.

Moreover, by Federal Law № 153 of June 8, 2015, changes were made in the disposition of paragraph 1, Article 187 "Unlawful trafficking of means of payment". The new version of the article establishes liability for "Creating, acquiring, keeping, transporting with intent to use or sell, and also selling of counterfeit payment cards, money transferring orders, payment documents and other means (except cases mentioned in Article 186 of the Code), and also electronic means, electronic information carriers, technical devices,

[1] *Model'nyj Ugolovnyj kodeks* [Model Criminal Code] / *Prilozhenie k informacionnomu bjulletenju Mezhparlamentskoj assamblei SNG* [Annex to the information bulletin of the Inter-parliamentary Assembly of the CIS] // SPb., 1996. № 10.

computer programs used for unauthorized acquiring, encashment and transferring money". The punishment for such offense is imprisonment for no more than six years. This helps to fight effectively against such computer crimes as "skimming", where a special device for reading and copying information from electronic bank cards is fixed on ATMs or electronic terminals.

A number of significant conclusions can be made in light of comparative legal analysis of criminal liability for the commission of computer crimes under criminal law legislation of Russia and foreign countries.

First, there is a common trend in capturing criminal liability for computer crimes in acts of legislation (criminal codes or special acts) as sources of law in Anglo-American, Scandinavian, Romano-Germanic and socialist legal systems.

Second, despite the differences between existing legal systems, there is a common trend in the "hybridization" of the national criminal systems, translated into formalizing some (special) crime components in legislation for crimes in the sphere of computer information (Russia, USA, China).

Third, computer crimes in foreign criminal legislation constitute not only free-standing crimes (Criminal Code of the Russian Federation, U.S. Code Title 18, Criminal Code of the Democratic People's Republic of China), but also common crimes in the capacity of a modus operandi.

Fourth, foreign criminal legislation is different from its Russian counterpart, where general computer crimes are in one chapter (Chapter 28 of the Criminal Code of the Russian Federation, "Crimes of computer information"), whereas foreign computer crimes are treated in different sections (chapters) of the Criminal Code (Swedish Penal Code, Danish Criminal Code, Criminal Code of the Federal Republic of Germany, French Penal Code, Criminal Code of the Democratic People's Republic of China).

Fifth, an object of criminal offense in computer crimes is not only social relations in the sphere of the safe use of information (the Criminal Code of the Russian Federation), but also other objects (e.g. the rights and liberties of an individual – the criminal codes of the United Kingdom, France and the Federal Republic of Germany; liberties and public peace – the Swedish Penal Code; State security – U.S. Code Title 18; public order and safety – the Chinese Penal Code).

Sixth, analyzing an objective side of computer crimes, we may conclude that the Criminal Code of the Russian Federation captures the formally defined crimes at the creation, use or dissemination of hostile computer programs (para. 1, Art. 237 Criminal Code of the Russian Federation); at the same time, they are not connected with socially dangerous consequences. In the criminal law of foreign countries where the creation, use or dissemination of hostile computer programs is discussed as a way of committing other crimes, the defined crime is material (Swedish Penal Code, Danish Criminal Code, German Criminal Code, French Penal Code).

Seventh, only an individual can be the perpetrator of computer crimes in the Russian criminal law system. And so also the Scandinavian and Romano-Germanic legal systems

accept a natural person in the role of perpetrator (Swedish Penal Code, Danish Criminal Code, French Penal Code).

Eighth, in Russian criminal law legislation intention is sufficient as regards mental state as an element in computer crimes.

Ninth, in Articles 272, 273 of the Russian Criminal Code, an act committed because of greed falls under aggravating circumstances: the motive behind the criminal activity is the main aspect of the mental element. Differently, foreign legislation as set down in the Criminal Codes of Belarus, Georgia, Azerbaijan, Latvia as well as the Kazakh Criminal Code (apart from the Uzbek Criminal Code), that is to say, the criminal law of CIS countries and the Baltic States, are constituted on the model-based Criminal Code, where the motives and goals of crimes are not counted as establishing a computer crime offense.

Tenth, individuals under the age of 16 are subject to prosecution in the Russian Federation for the commission of computer crimes. The Criminal Code of Latvia (Art. 11) – Criminal liability applies to individuals under the age of 14; Danish Criminal Code (Art. 15) – under the age of 15; Criminal Code of the Democratic People's Republic of China (Art.17) – under the age of 14, up to 16.

Finally, a big time lag exists between the identification of computer crimes and the creation of legal approaches to deal with them in the Russian Federation and when that took place in foreign countries. The criminalization of computer crimes in Russia only began in 1997, on January 1st, whereas in the USA, Sweden and other countries the criminal law systems implemented criminal liability in the 1970s and 1980s.

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CONFERENCE REVIEWS

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REVIEW OF THE KAZAN INTERNATIONAL LEGAL FORUM 14–16 SEPTEMBER 2017

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Abstract: "Kazan Legal" is a forum of practicing lawyers and scholars from the different fields of law. The aim of the forum is the discussion of the legal problems of today by those practicing and specializing in the fields, the exchange of knowledge and experience, and the search for solutions to those legal problems. This year, the annual forum was held in Kazan, and it was a great event for the city. The forum is organized each year by a leading Russian law firm. The honor of hosting the forum this year went to the law firm of Egorov, Puginsky, Afanasiev & Partners, with the Tatarstan Investment Development Agency, and the generous support of the Government of the Republic of Tatarstan. Participating in this year's forum were 300 organizations from 30 countries. The organizations were represented by 650 participants this year. Within the framework of the forum, participants discussed issues of development of the legal profession and legal education in a general sense, and the modernization of the present

legal system and legislation, too. Also addressed were a number of projects of a global nature, investment promotion, and opportunities in the Eurasian region, among other topics. One of the roundtables within the framework of the Kazan International Legal Forum took place on the campus of Kazan Federal University, where, additionally, the Law Faculty organized and chaired the official meeting of law professors and delegations of lawyers from the United States, China, and Malaysia.

Keywords: Kazan International Legal Forum, investment promotion, Tatarstan

From September 14th to 16th the Kazan International Legal Forum was held in the city of Kazan, Russia, with the generous support of the Government of the Republic of Tatarstan and hosted by the law firm of Egorov, Puginsky, Afanasiev & Partners.

"Kazan Legal" gathered together 650 delegates from 30 countries representing 300 organizations, including 200 business representatives, and approximately 100 foreign delegates and 100 representatives from Tatarstan.

The high level of discussions was evidenced by the attendance at the forum of such honored persons as the President of the Republic of Tatarstan, Rustam Minnikhanov, the Presidential Commissioner for Entrepreneurs' Rights, Boris Titov, and the Head of the Federal Antimonopoly Service of Russia, Igor Artemyev. Distinguished guests included the State Secretary-Deputy Head of the Federal Antimonopoly Service of Russia, Andrei Tsarikovsky; Deputy Chairman of the Board, member of the Board of Trade of the Eurasian Economic Commission, Veronika Nikishina; President of the European Commission for the Effectiveness of Justice, Council of Europe, Georg Stava; Chairman of the Board of the Association of Lawyers of Russia, Vladimir Gruzdev; Director General of JSC ESSEN Production AG, Leonid Baryshev; Director General of the Special Economic Zone "Innopolis", Igor Nosov; Vice-President for Corporate and Legal Affairs of PJSC MTS, Ruslan Ibragimov; Director of the Legal Department of PJSC Moscow Birzha, Alexander Smirnov; Legal Director of the Rosvodokanal Group, Dmitry Timofeev; Deputy Director General for Legal Issues of OJSC TMK, Andrey Zimin; Managing Director, Strategic Development and Corporate Communications Directorate, PJSC AK BARS Bank, Ilya Velder; Chairman, Senior Partner, RPC (Great Britain, Hong Kong, Singapore), Rupert Boswell; Partner, Hengeller Mueller (Germany), Christian Schmis; Partner, Macfarlanes LLP (UK), James Popperwell; Partner, Boies Schiller Flexner LLP (UK), Matthew Goetz; Senior Partner, Founder, Magnusson (Sweden), Per Magnusson; Partner, WOL F THEISS (Austria), Clemens Trottenberg; Senior Partner, Dispute Resolution Practice, Shardul Amarchand; Mangaldas & Co (India), Ritu Balla; Managing Partner, JSB, Yuri Pustovit; and many others.

The reports by lawyers, legal practitioners, and legal theorists, delivered within the framework of roundtables, sessions, and discussion groups, on topical issues of law will undoubtedly contribute to the development of the legal profession, improved and modern legislation, and the modernization of legal systems as a whole.

At the forum, participants discussed the legal aspects of a variety of projects, the possibilities of investment promotion, and innovation, the risks relating to legal responsibilities, new opportunities in the Eurasian region, the legal prospects for cooperation with the countries of the Middle East as well as the countries of Asia.

In view of the special interest in investment funds and other financial structures, several major sessions on the issue of the mutual influence of business and law were presented at the forum, which was the first time such a legal platform was organized and presented in Kazan.

One of the events within the forum was the business breakfast "Equal Representation in Arbitration". In recognition of the under-representation of women on international arbitral tribunals, in 2015 members of the arbitration community drew up a Pledge to take action. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity. The Pledge was launched in Russia under the auspices of the Kazan International Legal Forum. Debevoise & Plimpton's Wendy Miles, Wilmer Hale's Steven Finizio, and Egorov, Puginsky, Afanasiev & Partners' Dmitry Dyakin introduced the initiative to the audience during the breakfast.

As part of the plenary session "The Legal Environment as a Key Factor in Economic Growth, Case Study: The Republic of Tatarstan", participants agreed that the law and law enforcement are important factors when it comes to regions and countries competing for the financial interest of investors. This is confirmed by the World Bank's "Doing Business" rankings, which rely on indices such as enforcement of contracts, protection of minority investors, resolution of insolvency, and labor market regulation. Russia's advancement in the rankings (from 120 to 40 in six years) clearly demonstrates the efforts the state has taken to improve the investment climate. Corresponding initiatives are also carried out at the regional level. What further reforms does the business community expect? What steps is the state going to take to improve the regulatory environment and mitigate the risks that businesses face? How is the business environment in Tatarstan, which is ranked first among Russia's 85 regions by the Agency for Strategic Initiatives, different? These issues were raised during the plenary session.

Several satellite events were held during the forum. One of them was the "Legal IT track". The idea behind this event was the presentation by several different representatives of legal vendors of their products in such areas as time management, CRM, and Artificial Intelligence (AI), among others, to the delegates at the forum.

In total, twenty-five sessions, roundtables, and briefings took place within the framework of the forum. The topics they covered included "Challenges in the Management of International Disputes", "Investment Arbitration: Additional Opportunity to Protect Investments", "The Russian LCIA? – Looking at the Initial Results of the Arbitration Courts Reform", "Show Me the Money: Enforcement of Judgments in Russia", "Your 'User Manual' on Attracting Investment and Joint Venture Partners", "Corporate Transactions: Russian vs. English Law", "Work of Notaries for the Benefit of Business", "Special

Economic Zones as a Mechanism to Drive Innovation, 'Smart Cities'", "State Property: Investment Attractiveness and Actual Mechanisms of Involving Property in Return", "Investment and Financial Cooperation with Asia and the Middle East: Obstacles and Recommendations", "Environment: New Aspects of the Government's Environmental Policy and the Modernization of Environmental Legislation", "Antitrust Policy: Current Approaches and Trends", "Antitrust and the Business Environment. Competition in the Digital Era", "Antitrust and the Business Environment: Experience of Tatarstan", "Legal Challenges in the 4th Industrial Revolution", and others.

Kazan Federal University was honored to be one of the sites for the forum. For example, the roundtable "Is Legal Education in Line with the Demands of Corporate Legal Departments and Law Firms?" took place on the campus of KFU. At the roundtable, it was noted that Russian universities provide their students with a solid academic foundation, but for a successful career, future graduates will also require highly practical as well as "soft" skills: time management, emotional intelligence, and the ability to work in a team. Without these skills, not only do graduates lose out, but so too do companies, which are forced to spend time and resources training new employees. The same situation is also apparent in the legal world. Some universities are organizing short-term internships in law firms and corporate legal departments for their students, as well as masters classes led by legal practitioners; however, employers are not always eager to participate in such initiatives. Why is this the case, and how can employers in the legal professions and higher education institutions in the sector find a common language? How can legal education be made practical, and the lawyers of the future prepared for their adult working life during their time as university students? The answers to these questions were sought by the participants of the roundtable. The moderators for this event were Andrey Mikhaylov (Kazan Federal University) and Alexander Molotnikov (Moscow State University).

The following events were also held at KFU: the roundtable by the Association of Lawyers of Russia "Models for Professional Legal Associations. Russia and Indonesia"; the Workshop for Senior Year Students of the Kazan Federal University Faculty of Law (Team Play): "Negotiating the Deal"; and the roundtable "Labor Law and Business: Practice and Problems of Interaction" with moderator M.V. Vasilyev from Kazan Federal University.

The guests at the forum enjoyed a rich cultural program. On the first day of the forum, guests were invited to a welcome cocktail at one of the best bars in Kazan – "Extra Lounge", located on the 25th floor of the Korston Club. The second and main day of the forum was completed with the gala dinner at the Kazan Town Hall, the former mansion of the Nobility Assembly, where today's high-level receptions and business events are held. Guests were personally received by Mayor of Kazan Ilsur Metshin. On the third day, the guests were invited to experience the history and culture of Kazan. An enjoyable and interesting sightseeing tour was conducted that included a visit to the ancient county town of Sviyazhsk. The closing event of the three-day gathering

was an evening reception in the national style which took place at the International Equestrian Center "Kazan".

The Kazan International Legal Forum professionally demonstrated the fact that Russia is still at the center of international legal development and innovation. The forum presented an excellent opportunity for lawyers with a wide range of legal interests to take part in the discussion of all fields of law, which, among other positive outcomes, allows finding the right ways for collaborative work to improve legislation, given the number and variety of program topics covered.

Kazan Legal was also a forum for the useful exchange of views, which can contribute to progress in relations between countries, and provide a strong impetus for the creation of supranational law, which will allow solving, peacefully, major global problems.

The hope is that the forum will continue, become part of the legal tradition, and be set down as a must-attend annual event on the calendars of the leading lawyers of Russia and of leading lawyers from around the world.

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REVIEW OF THE IV ANNUAL SYMPOSIUM OF THE JOURNAL *HERALD OF CIVIL PROCEDURE*: "2017 – E-JUSTICE AND INFORMATION TECHNOLOGIES IN CIVIL PROCEDURE"

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Abstract: The *Herald of Civil Procedure* journal brings together outstanding scholars of civil procedure each year. This year the journal's IV Annual Symposium was devoted not only to civil procedure, but also to information technologies and e-justice, which allowed inviting scholars and practicing lawyers and specialists in the information technology (IT) sphere to this year's event. The symposium was enriched by the participation of foreign scholars: Pablo Bravo Hurtado (the Netherlands), Wing Winky So (Great Britain), Jaroslaw Turlukovski (Poland), and Vincent Teahan (the USA). Their presentations allowed symposium attendees to see the uses of electronic technologies abroad and to make comparisons with Russian challenges in the IT sphere.

Russian participants included bright scholars such as Alexander Bonner, Vladimir Yarkov, Elena Borisova, Lidia Terekhova and others who devoted their presentations to IT currently in use in Russian civil procedure. Kirill Samoylov, Commercial Director of

the publishing house Statut, presented the fifth anniversary book in the series "Classics of Civil Procedure" devoted to the groundbreaking work of Nina Klein in "Counteraction in court and arbitration". Also presented was the new issue of the journal *Herald of Civil Procedure* and the new federal media, English-language journal *Kazan University Law Review*. This year's successful symposium brought together more than 120 participants, and organizers expressed their optimism for success of the symposium again next year.

Keywords: symposium, civil procedure, e-justice, information technology, IT, Herald of Civil Procedure, Tatarstan

The IV Annual Symposium of the Journal *Herald of Civil Procedure* "2017 – E-justice and Information Technologies in Civil Procedure" took place on 29 September 2017 on the campus of the Law Faculty of Kazan (Volga region) Federal University.

The annual event is a tradition at the Law Faculty of Kazan University, where the leading legal scholars in the field of civil procedure, practicing lawyers, representatives of government, members of the judicial community, representatives of the Federal Court Bailiff Service and prosecutor's office gather in Kazan each September.

The Symposium of the *Herald of Civil Procedure* journal brings together lawyers from Russia and foreign countries in order to allow them collectively, through the lens of personal experiences, to pass on theoretical knowledge comprehended in practical activities, confront the most current problems arising both in the legal science of civil process and in all stages of its implementation, analyze the latest innovations in legislation, and share experience in court practice with colleagues.

The use of information technology (IT) in civil legal proceedings has become a subject for debate and heated discussion this year. This is attributable to developments in IT and to the fact that "electronic justice" has gained popularity and trust, and has become an integral part of the practical activities of all representatives of the legal community. The presentations by the speakers at the Symposium were devoted to the questions arising from the exchange of information in an electronic digital form among parties to judicial proceedings. During the Symposium, not only the challenges and problems arising in this sphere were submitted for discussion, but also the positive aspects of the use of IT in the daily work of lawyers received attention, and the most successful practices of their application were discussed.

The IV Annual Symposium of the Journal *Herald of Civil Procedure*: "2017 – E-justice and Information Technologies in Civil Procedure" opened with an address to all participants in the form of the official greeting from the journal's Chief Editor, Doctor of Legal Science, Professor Damir Valeev. Professor Valeev noted that the Symposium at Kazan University is not only a tradition of the last four years, whereby a large number of outstanding representatives of procedural legal science from different countries of the world gather on one platform, but it is also a tribute to the traditions of

the Kazan Imperial University, one of the oldest classical universities. Professor Valeev also emphasized the importance of the selected topic for this year's Symposium which was chosen owing to the fact that information technologies are having a huge impact on human life today, and that it is necessary to study the future prospects of their application in the reality of the legal professions.

The opening ceremony continued with welcoming remarks by journal friends and supporters to all participants. Following this, the floor was passed to the representative of the organization that has been working side by side with the journal team since its very creation – Kirill Samoylov, the Commercial Director of the publishing house Statut. Mr. Samoylov presented the recently published fifth anniversary book in the series "Classics of Civil Procedure", devoted to the groundbreaking work of Nina Klein in "Counteraction in court and arbitration". In addition, Mr. Samoylov and Professor Valeev jointly presented the new issue of the journal *Herald of Civil Procedure* and the new, federal media perspective, English-language journal *Kazan University Law Review*. It was appropriately noted that the journal *Herald of Civil Procedure* has strongly occupied a niche and found a circle of devoted readers during the seven years of the edition. Mr. Samoylov drew attention to the fact that many of those present at the Symposium were authors and active contributors to the publishing house Statut, and he hoped that collaboration would continue and, indeed, only get stronger. Following these remarks, the floor was given to representatives of the judiciary. The first speaker was Marat Khayrullin, Vice Chairman of the Supreme Court of the Republic of Tatarstan. Vice Chairman Khayrullin emphasized the importance of information support of the court system and cited statistics relating to the electronic system operation "Justice" in the Republic of Tatarstan. He also mentioned the need for universal use of advanced technologies such as videoconferencing for the work of the courts. He then went on to provide a brief review of the legislative changes which raise the degree of the integration of information technology into civil and arbitral procedure. Following these well-received remarks, Judge Artur Shakarayev, of the Constitutional Court of the Republic of Tatarstan, further welcomed the participants at the event on behalf of the judicial community. He emphasized that the chosen topic of the Symposium answered those transformations taking place in public life. Judge Shakarayev specifically noted that information technologies contribute to enhancing the effectiveness of judicial protection of citizens as well as to making possible faster appeal to public authorities, which have positive effects both on the speed of consideration of the application and on its quality and transparency. The conclusion of his remarks signaled the end of the opening ceremony of the IV Annual Symposium. Speakers then took to the floor to deliver their presentations.

The first speaker was Vladimir Yarkov, Doctor of Legal Science, Professor, Head of the Department of Civil Procedure at Ural State Law University. His report was devoted to one of the most heatedly discussed and widely introduced technologies quickly developing today, and was titled: "Blockchain and notaries: the first evaluation

experience". In his presentation, Professor Yarkov described the principle work of blockchain technology, explained its features and the prospects for its use in complex transactions. As a result of his study of the subject, he has come to the conclusion that this technology provides transparency of information, its indestructibility, and that this technology is convenient for simple transaction processing (simple contract), but its possibilities are limited owing to subject structure, the existence of various encumbrances, and the rights of third parties. He further specified that blockchain provides only technological transparency of the transaction, that there is no examination of legal credibility of the transaction in this system, and that there is no legitimization of order. In addition, there is no check on capacity of the subject that is currently participating in the transaction. Therefore, while the notaries have a long and uncertain century still before them, in the present situation blockchain will not replace them completely.

Next to speak was Vincent Teahan, a practicing attorney and partner in the law firm of Teahan & Constantino, in New York, USA. The subject of his report was "New York state courts: electronic filing". The American expert talked about the opportunities that are available for electronic submission of documents. He noted the advantages of this system, such as speed, transparency, and the possibility of monitoring statements in real time. He elaborated on the work of the New York state courts in following the criterion of using information technologies. Mr. Teahan pointed out that there is a very high level of integration of technologies in the work of the courts in the state of New York, as annually approximately 2 billion U.S. dollars are allocated for the state judicial system – powerful support for the judiciary. In closing, he outlined his interest in the expanding use of information technologies in the court systems of other countries, particularly Russia.

Doctor of Legal Science Alexander Bonner, outstanding civil procedural law specialist and Professor at Kutafin Moscow State Law University, followed with his report titled "Judicial reform in Russia: one step forward, two steps back". Professor Bonner began his prepared remarks by talking about issues in respect of the course of justice and gave some examples from other countries, including the development of what might be called the "robot judge". The main idea here is that in the near future androids will not, as some have forecast, replace human judges, because only people can administer justice carefully and take into consideration all of the factors involved in a case. On the subject of information technology, Professor Bonner expressed his approval that Russia was beginning to make use of IT more in the judicial system, but he criticized the judicial system reforms because they had not been completed yet. From his point of view, today the Russian court system is in an uncertain state, and it is hard to determine its direction of development.

Stepping up to speak next was Judge of the Arbitration Court of the Republic of Tatarstan Alexey Kirillov. His talk covered the procedural basis of electronic justice, and he commented on the subject of the Strategy for Information Society Development in

Russia 2017-2030. Judge Kirillov also offered his views on judicial legislative frameworks and the use of electronic justice in the Republic of Tatarstan.

Wing Winky So, Ph.D. candidate at the University of Oxford, spoke next on the issue of the latest changes in using technology in the civil and arbitration courts of England and Hong Kong. In the context of his report, he spotlighted the high level of IT in use in these countries, which explains the high efficiency in the operation of their courts.

Following Mr. So was Elena Borisova, Doctor of Legal Science, Professor at the Department of Civil Procedure in Lomonosov Moscow State University, member of the editorial board of the journal *Herald of Civil Procedure*. Her presentation focused on "Audio and video protocol: advantages and disadvantages", during which she identified the personality of the actuary. In addition, Professor Borisova touched on the issue of protocoling by audio, fixed as an alternative to the work of the actuary. According to her report, such a method would produce a higher quality of fixing symbols. Consequently, protocols of court sessions would be more informative. However, she noted that it would be impossible to make changes without high financial investment.

Elena Smagina, Ph.D. in Law, Head of Civil Procedure and Employment Law at South Federal University, spoke on "New responsibilities of participants in the civil process related to the use of information technology". In her report she described new standards which parties must implement today, and those standards which should be created in the future in order to improve procedure. She stressed the importance of the changes as being conducive to making the process of justice faster and of a higher quality.

The series of reports from Russian legal scientists paused temporarily when Pablo Bravo Hurtado, Lecturer, Ph.D. candidate at Maastricht University, the Netherlands, addressed the participants on the subject "Montesquieu's Utopia? On the automatization of civil justice". His talk included the issues surrounding the creation of the 'robot judge', but the speaker considered the question from a fresh perspective. Exploring the subject, he wondered whether we were ready to trust our lives to a machine. Moreover, Mr. Hurtado touched on questions about the possibility of ignoring human empathy. Of course a judge in passing judgment follows the letter of the law, but he or she also takes into account the sufferings of people. Robots, androids, cannot do that. As a result, the speaker emphasized one of the global problems of modern society, the readiness of trusting the computer.

The final speaker of the first part of the Symposium was Ruslan Khusnulin, Development Director of the Iron Neo company, a partner of ABBYY, with his report on "The introduction of the progressive scan system in the work of courts". Mr. Khusnulin devoted his presentation to a discussion of the opportunity of making a program that could improve the work of the courts by scanning high numbers of documents for the purpose of creating prescribed documents by using the results of scanning several similar files and finding nodal points among them. Mr. Khusnulin outlined how the system could be advantageous in relation to electronic cases.

The second part of the Symposium began with the talk given by Lidia Terekhova, Doctor of Legal Science, Professor, Head of the Department of Civil Procedure at Omsk State University, on "Information technologies in the practice of arbitration courts". In her report, Professor Terekhova delved into a number of the aspects relating to the use of the "My arbiter" system, its advantages and disadvantages, and she noted different ways of improving law-related electronic systems.

The next speaker up was Vladimir Gureev, Doctor of Legal Science, Professor at the Department of Organization and Service of Court Bailiffs and Executive Production of the All-Russian State University of Studies (the Russian Academy of Justice of the Ministry of Justice of Russia), and Editor-in-Chief of the journal *Executive Proceedings*. His report was titled "Information technologies in the new legislation on collection of arrears: influence on the civil process and enforcement proceeding" and devoted to the application of technology in enforcement procedure.

The participants then heard from Mr. Azat Khisamov who talked about the challenges in the realization of e-justice elements in the Tatarstan Republic's court practices. He emphasized that the format of this Symposium provides the opportunity to review these challenges from three points of view: from the point of view of the scientific community, from the point of view of practicing lawyers, and from the point of view of the judiciary. He went on to explain that the Tatarstan Republic had reacted quickly to the legislative changes that have influenced the challenges of e-justice. The previously unmentioned problem of the technical refusal in electronic documents submission was highlighted. An analysis of the term "e-justice", enshrined in normative legal acts and jurisprudence, had been carried out. Mr. Khisamov presented a relatively controversial conclusion when he stated that the algorithm of information technology development in judicial systems leads to a situation in which it will perform operations by itself, which has the potential to seriously harm the principles of justice.

Symposium participants then heard from Igor Smolenskiy, Judge of the Arbitration Court of the Volga Region, who invited everyone's attention to the issue of a person's identification (subject of the arbitration process) in e-justice. He noted that the legislation is imperfect in defining the criteria that will allow most accurately to authenticate the person submitting a claim. Moreover, it is, naturally, relatively hard to confirm the person's intention. However, he noted that there are at least some positive trends in identifying a person participating in a judicial process. These trends are linked with the electronic signature. A document signed by means of the strengthened (security of) electronic signature procedure equates to a paper document certified in due course. Thus, Judge Smolenskiy came to the conclusion that the use of IT in some cases allows identification of the parties to the arbitration process.

Several reports relating to business law were presented by the speakers who then followed.

Roman Bulatov, Deputy Director General for corporate policy at JSC "Tatenergo", delivered his report on "Electronic document management in the claim-related work

of the resource-supplying organization". He pointed out that in its operations JSC "Tatenergo" faces the problem of receivables, which is something that is widespread in the sphere of power engineering and needs the automation of procedures. JSC "Tatenergo" has managed to optimize this process by means of effective document management. Moreover, Deputy Director General Bulatov explained that there is a problem linked to the scanning and uploading of documents into the "My arbitor" system. Another problem is the impossibility of eliminating the causes under which a claim can be left without motion. And there is the additional problem of defining the categories of cases that are reviewed in a summary proceedings, because in such cases all documents can be viewed remotely. Therefore, a proposal has been made to raise the monetary threshold for summary proceedings. A final problem brought forward for examination by the speaker is the fact that even in the case of electronic submission of documents, court clerks print the documents in paper form.

Speaking next was Konstantin Egorov, Candidate in Legal Science, Associate Professor, General Director of the law firm of "StroyCapital". His report, "Protection of the property rights of the parties to the smart-contract: the possibility of arbitration", touched on such problems as the difficulty in the settlement of disputes in respect of smart-contracts in government courts, as well as the problem of creation of an alternative mechanism of their regulation and settlement. He also mentioned the problem of the necessity of introducing mandatory arbitration clauses into smart-contracts. The speaker remarked on the significance of the participation of the representatives in the IT community in the creation of the regulation mechanism, and that such an idea was given life owing to the system's complexity. Moreover, there existed ideas on the possibility of implementing technologies similar to blockchain for fraud prevention. In concluding his talk, he stressed the importance of an inter-disciplinary approach to the creation of the mechanism for the system's operation and its legal regulation.

Jaroslav Turlukovski, Doctor of Legal Science, Professor at the Faculty of Law and Administration of Warsaw University, followed with his report "Issues on judicial practice of registration of legal entities via the Internet: a tribute to European fashion or a real need?", which addressed, first, a novelty of Polish law that implies a judicial body as a registering body for legal entities and, second, a specificity of registration of limited liability companies. Furthermore, he touched on questions relating to electronic signature usage both while registering legal entities and while reporting submissions.

The sequence of reports came to a close with Candidate in Legal Science, Arbitrator of the ICAC at the Chamber of Commerce and Industry of the Russian Federation, Dmitry Ogorodov delivering his report "Legal aspects of artificial intelligence and robotics systems: misconceptions and actual problems". Mr. Ogorodov spoke on the questions of the legal personality of robots and technical systems of artificial intelligence, the legal qualification of robotics and technical systems of artificial intelligence, and the risks and dangers of mass usage of robotics and artificial intelligence in cities. He also addressed serious questions relating to the regulation of artificial intelligence and robotics both

by the current legislation and by the creation of a new unified act, covering all aspects existing in the process of artificial intelligence and robotics regulation, from weights and measures to liability, and included additional comments on the creation of infrastructure for robotics operations and their integration into city spaces. In concluding his remarks, the speaker highlighted that today there is a vast amount of uncertainty which does not allow us to fully evaluate the prospects and trends of development in this area, both with respect to legislation and to its application in practice.

At the conclusion of all the reports by Symposium speakers, Professor Damir Valeev expressed his gratitude to all the speakers and participants at the event and noted his expectation that the tradition of inviting the best representatives of civil procedural legal science, leading scholars, and practicing lawyers to the Law Faculty of Kazan Federal University will continue. Professor Valeev then warmly invited everyone to return next year for the V Annual Symposium of the Journal *Herald of Civil Procedure*.

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Master program
«JUDICIAL LAWYER IN CIVIL, ARBITRATION AND ADMINISTRATIVE PROCEDURE»
(in Russian language)

The Head of the Master's program – Doctor of Legal Sciences,
professor **Damir Valeev.**

Foreign lecturers and practicing lawyers:
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Pablo Bravo Hurtado, Maastricht University (Chile, the Netherlands)
Jaroslaw Turlukovski, Warsaw University (Poland)
Vincent Teahan, practicing lawyer in the sphere
of Tax law and civil procedure (USA)

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Legal technics and technology
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Academic communication
Comparative legal studies
Methodology of teaching the jurisprudence in higher school
Actual problems of civil, arbitration and administrative procedure
Theory and practice of execution of judicial and non-judicial acts
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Bankruptcy in arbitration proceedings
International Civil Procedure
Arbitration proceedings
Notarial proceedings

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Culture of conduct in Conflict
Protection of rights in administrative cases
The trial of intellectual property rights

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Educational practice
Pre-Diploma practice

Teaching method:
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Career perspectives:
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(in English language)

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The Head of the direction on work with master students at Faculty of law, KFU – Doctor of Legal Sciences, assoc. prof. **Roustem Davletguildeev –** roustem.davletguildeev@kpfu.ru

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Legal technics and technology (2)
History and methodology of judicial science (2)
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International financial and banking law (4)
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International civil process (4)
International economic organizations (4)
International business and human rights protection (4)
Law of international treaties (4)
International trade contracts (4)
Islamic trade law (4)
Preparation for the UN model and international Moot Court competitions (4)

Practice (credit points):

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Pre-Diploma practice (39)

Teaching method:

Full-time/ distant; Fee-paid/ free-paying (selection on competitive basis)

Career perspectives:

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about the application rules for 2017-2018 academic year on the website of KFU:
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