



KONTakt

KIELER OSTRECHTS-NOTIZEN
Institute of East European Law, University of Kiel
Vol. 2 – Nr. 1 (April 1999)

FOREWORD

Liebe Leser – Dear Reader,

this third issue of KONTakt is our first try in English language. Also this is our first joint venture with students from the Law Faculty of the University of Saint Petersburg. After a seminar, which took place in St. Petersburg in November 1998 and followed a similar seminar in Kiel in November 1997, the participants wished to bring some of their impressions into written form. A little bit besides this main topic you will find in this issue some notes about an excursion to the Federal Supreme Court in Karlsruhe, which was a part of a seminar on insolvency law. We put this article into KONTakt as such excursions will at some later stage – hopefully – also include participants from Eastern Europe.

The Institute of East European Law will in the next few months have to sail through heavy waters. We hope to be able to continue KONTakt in the future.

Prof. Dr. Alexander Trunk



The banquet: reward for heavy work

Contents:

- *Marina P. Fedorova*: In Re: Joint German-Russian Seminar on German and Russian Private International Law (p. 2)
- *Natasha Zharinova*: Different approaches lead to similar results (p. 3)
- *Joan Vivika Kutter*: On behalf of the German participants (p. 6)
- *Tim Schröder*: Russian Sales law and the Vienna Sales Convention (p. 6)
- *Frauke Beck*, Russian International contracts law (p. 9)
- *Morten Fogt*, International property law in Russia (p. 10)
- *Tim Schröder*: Legal Cheating in Russia (p. 14)
- *Hermann Lindhorst*: The Bundesgerichtshof Backstage Tour (p. 15)

Impressum

KONTakt was founded in 1998 and is published by the staff of the Institute of East European Law, Christian-Albrechts-Universität, Kiel, Germany

Editor-in-Chief: *Tim Schröder*

Editor's office:

Institut für Ostrecht, Neufeldtstraße 32,
24118 Kiel

Tel: 0431-880-2172 Fax: 0431-880-3048

eMail: office-eastlaw@law.uni-kiel.de

WWW: <http://www.uni-kiel.de/eastlaw/>

Marina P. Fedorova, Faculty of Law, St. Petersburg State University, Russia



In Re: Joint German-Russian Seminar on German and Russian Private International Law

On November, 22-29, 1998, the Joint German-Russian Seminar on German and Russian Private International Law was held in Saint Petersburg, Russia. The Seminar was hosted by the Law Faculty of Saint Petersburg State University, it was organized in order to prolong the tight connection between the Institute of East European Law of Christian Albrecht University of Kiel and the Law Faculty of St. Petersburg State University which were established in 1997. I would like to remind that in November, 1997, a group of Russian law students came to Kiel and took part in the Joint German-Russian Seminar devoted to the German and Russian Commercial Law. Both German and Russian Parties highly appreciated the experience and decided to continue the collaboration.

The Seminar in Russia involved 12 German and 12 Russian students into the learning and comparing of the legal institutes of both countries. The students dealt with the different (or sometimes, similar) approaches to the institutions of international arbitration, recognition of foreign judgments, movable and immovable property, family and inheritance law and other issues of Private International Law. The participants worked hard and several days were completely devoted to the Seminar sittings.

According to the program of the Seminar, the German students made several official visits to the

status (like Berlin, Bremen and Hamburg in Germany). Consequently, Saint Petersburg has its own legislative and executive bodies like other states of the Russian Federation. German students visited the Legislative Assembly of Saint Petersburg and Administration of Saint Petersburg and met the Heads of the Legal Departments of these institutions. The German guests also visited the headquarters of the Inter-Parliamentary Assembly of the Commonwealth of Independent States (CIS) which is situated in Saint Petersburg and were told about the process of model law-making under the framework of the CIS.

The next part of official meetings was connected with Germany: Thus, the participants of the Seminar visited the General Consulate of Germany in Saint Petersburg and discussed the future of cultural ties between Germany and Russia. Then they made a very interesting visit to the House of the German Economy.

It is possible to write about the scientific and official sides of the Seminar a big book, not only a short article. But, as a Russian participant, I would like to describe my impression made by the informal part of the Seminar.

We tried to make this Seminar not only a scientific event but also the means of communication between the students of two countries. It is well known that to understand the law of a particular country is not



Prof. Musin, Prof. Trunk and grateful Russian and German students

state bodies. The city of Saint Petersburg has federal enough to study the set of legal rules, it is also neces-

sary to know the roots of these rules, therefore it is necessary to understand the culture, the national character of the people living in the country. That is why we organized several cultural events for our German friends.

To let our guests feel the spirit of our city, the former capital of Russia, there was organized a city tour. They have also visited one of the most famous Russian ballet performance "The Swan Lake". Our guests saw the masterpieces of the Hermitage museum and the unique ensemble of the former Emperor's residence in Tzarskoe Selo.

But, to my mind, the most important thing was that we could communicate with each other and discuss different problems. The informal part of the Seminar was not an obstacle, but on the contrary, it

helped us to understand the legal institutions of both countries, to compare and analyze them. Sometimes the scientific discussions took place even in cafes. It was a wonderful experience and we hope we will continue it.

On behalf of the Russian participants I would like to say special thanks to Prof. Dr. Alexander Trunk, the Head of the Institute of East European Law of the Christian Albrecht University of Kiel; Prof. Dr. Valery Musin, the Head of the Department of Civil Procedure of St. Petersburg State University; Reader Alexander Vershinin, PhD, Department of Civil Procedure of St. Petersburg State University.

Hope to see you soon!

Natalia Zharinova, post-graduate student, St. Petersburg State University, Russia



Different Approaches Lead to Similar Results

Recognition of foreign judgments upon German and Russian legislation

Russian and German legislation exercise quite antithetical approaches to recognition of foreign judgments without international treaties on mutual legal assistance. Yet, if we consider categories of foreign judgments which are actually being recognized in German and Russian judicial practice, we will surprisingly find that at least in the German-Russian relationship these two opposite approaches provide similar results. What is the reason for that? Was it a global trend of unification of international legal practice that caused similar results in interpretation and enforcement of different legislative provisions? Evidently, global unification has had rather strong influence with German and Russian legal practice, but on my opinion it is differences in legal techniques used in acts of German and Russian legislation to state quite similar provisions that seems to be the true reason rather than any outer impact. Now let's turn to the essential analysis of Russian and German legislation on recognition of foreign judgments without international treaties on mutual legal assistance.

I. Recognition of foreign judgments in Russia

The basic principle of Russian legislation on this matter is provided by Decree of the Presidium of the Supreme Soviet of the USSR called "On Recognition and Execution of Decisions of the Foreign Courts and Arbitrage in the USSR" (from June 21, 1988). This decree continues to be in force in Russian Federation

in absence of posterior federal legislation regulating the same matter. Upon the named decree "foreign judgments are recognized and executed in the USSR if it is provided so by the international treaty of the USSR. Foreign judgments which do not require an execution are recognized in the USSR if it is provided so by the international treaty of the USSR or by the Soviet legislation". Therefore, the basic principle, or presumption of Russian legislation is that foreign judgments are not recognized in Russia unless contrary is provided by treaty to which Russia is a party of by the acts of Russian legislation.

Russian legislation provides recognition of foreign divorce decrees and adoptions pronounced in a foreign country (Articles 160, 165 of the Family Code). According to the Article 1 of the Federal Law "On Insolvency (Bankruptcy)" foreign judgments held within insolvency proceedings in absence of the international treaty are recognized in Russia upon the reciprocity principle.

II. Recognition of foreign judgments in Germany

If we consider the main act of German legislation regulating foreign judgments recognition in Germany - it is the Code of Civil Procedure Rules of the Federal Republic of Germany (from January 30, 1877), we will find quite different approach to the problem. § 328 of the Code of Civil Procedure Rules comprises conditions on which recognition of a foreign judg-

ment is excluded. Therefore, it can be quite reasonably inferred from § 328 that the basic principle according to German legislation is a presumption of recognition of foreign judgments.

Let's consider now the following conditions, upon which the recognition of a foreign judgment in Germany is excluded.

First of all, the § 328 sec. 1, subs. 1 provides that recognition of the foreign judgment is excluded "if the courts of the state to which the foreign court belongs are not competent according to the German law". This means that in case if foreign judgment was held on the matter which doesn't fall within the jurisdiction of the court at all if considered in Germany, or if the German court has an exclusive jurisdiction to solve the case and therefore there is no jurisdiction of any foreign court, then such a foreign judgment will not be recognized in Germany. This really makes sense because otherwise it could have happen that the matter that could not be resolved by German court because it does not have a legal sense under German legislation would be recognized as judicially solved if it was considered by a foreign court. Russian Decree on recognition of foreign judgments includes a similar rule, stating that the foreign judgment cannot be recognized in Russia if there is an exclusive jurisdiction



Joint seminars can sometimes be a hairy event

of Russian court on solving the matter. So, to be recognized in Germany, first of all the foreign judgment must meet German standards of court jurisdiction.

§ 328 sec. 1, subs. 2 provides that recognition of the foreign judgment is excluded also if the defendant, who has not participated in the proceedings and raises his plea, has not been served with the written pleadings initiating the proceedings in the regular way or in a timely manner, so that he was not in a position to defend himself. This provision is a rather serious guarantee of the defendant's right to protect his rights and fully complies with the principle of adversary character of civil proceeding. There is a parallel provision in Russian legislation with only the following difference. Upon the Russian Decree it is not only the defendant, but any party against which the decision

was held who must be served properly with the complaint. The rule of Russian legislation seems to be more wide, as the situation, though rarely, can occur when the plaintiff was not properly served somehow and could not therefore properly maintain his position, as a consequence a judgment being held against him. Still, I think that provision of German Code of Civil Procedure Rules is more reasonable, for the problem of defendant's inability to maintain his interests is much more typical.

Upon § 328 sec. 1, subs. 3 of German Code of Civil Procedure Rules recognition of the foreign judgment is excluded if the judgment is inconsistent with a judgment issued here or with an earlier foreign judgment subject to recognition or if the proceedings on which it is based are inconsistent with an earlier proceeding here which has become final. So, the foreign decision must not conflict with a decision rendered or recognized previously in Germany, and German legal proceedings between the same parties on the same issue must not had been initiated before the foreign proceedings became pendent. There's the same provision in Russian legislation.

According to § 328 sec. 1, subs. 4 the recognition of a foreign judgment is excluded if it would lead to a result which is manifestly incompatible with the basic

principles of the German law, especially when the recognition would be inconsistent with the Constitution. The Russian Decree on the recognition of foreign judgments, besides the "basic principles of the Soviet legislation" mentions also "controversy with the sovereignty of the USSR" and "endangering the security of the USSR" as the conditions making the recognition of the foreign judgment impossible. As far as sovereignty and security of the country obviously belong to the list of basic principles of the internal legislation, the fact that these two conditions

are specially segregated can be treated just as a residue of the "Cold War" times. Though this requirement of compliance with the public order is one of the most widely spread and one of the most importance in the international private law, it has no specific appliance in field of foreign judgments recognition. So, we are turning to the next provision.

The last, and probably the most important and interesting condition upon which the foreign judgment cannot be recognized in Germany, according to § 328 sec. 1, subs. 5 of German Code of Civil Procedure Rules, is case when reciprocity is not assured. Whether reciprocity is guaranteed between Germany and a foreign State has to be decided for every type of proceedings separately. No formal guarantee is necessary. It is sufficient that a German judgment of the

same type as the decision seeking recognition in Germany has in fact been recognized in the foreign forum State.

Though the German legislation is based upon the presumption of recognition of foreign judgments, this requirement of reciprocity seriously narrows the scope of countries and judgments that can be recognized in Germany. The reciprocity requirement is one of the most disputable provisions of § 328 of the German Civil Procedure Code. First of all, this requirement doesn't apply to all foreign judgments seeking recognition.

According to § 328 sec. 2 the absence of reciprocity doesn't bar the recognition of the judgment if the judgment concerns a claim other than a money claim and under the German law no jurisdiction was established inland or if it concerns an affiliation matter. Also § 16a of the Act on Matters of Non-contentious Procedure such as declaration of death, affiliation matters, registration of business etc. doesn't include a reciprocity requirement for recognition of foreign judgments on such matters. The Insolvency Act that replaced the German Bankruptcy Code of 1877 on January 1, 1999, also doesn't include the reciprocity requirement. Because of its rules and the rule of § 16a of the Act on Matters of Non-contentious Procedure being newer than the rule of § 328 of the Civil Procedure Code, it seems to me that they must widen the scope of matters that don't request reciprocity in recognition of foreign judgments. Also it is necessary to mention a specific order and specialized authorities that handle recognition of foreign divorce decrees in Germany, provided by the Statute of August 11, 1961, on the Revision of Family Law. According to article 7 of the Act reciprocity is neither required for the recognition of foreign divorce decrees.

Thus, the rule of reciprocity for recognition of foreign judgments is not applied in cases which deal with public interest, like insolvency matters, declaration of death, and also with interests of such categories like minors, who cannot protect themselves and the public interest is being also affected therefore. The other exception provided by § 328 sec. 2 of the Civil Procedure Code are the non-material claims if there's no jurisdiction established inland under the German law.



Beautiful view of wintry St. Petersburg

III. Summary

Coming to the end of my report, I would like to state again clearly the main difference between Russian and German legislative approach to recognition of foreign judgments. The German legislation is based upon the presumption of recognition of foreign judgments unless they don't meet the certain requirements. The presumption of Russian legislation on this matter is that foreign judgments are not recognized in Russia unless the contrary is provided by treaty or Russian legislation. Such provisions of Russian legislation may be historically explained, for they are coming from Soviet time, when Soviet legal system and the whole country was closed from any outer impact. And though it seems that German legislation is thus more open and provides recognition of almost all foreign court decisions, the reciprocity requirement makes the scope of recognizable judgments without treaties more narrow.

Thus, legal regulation of recognition of foreign judgments in Russia and Germany illustrates the difference in legal techniques of Russian (former Soviet) and German legislators. Provisions of Soviet legislation because of its strict and interdictory character were stated generally in a form of prohibition which could have some exceptions. German civil legislation, having a long history of non-mandatory legal regulation, mostly comprises permissive provisions which also may have some exceptions. As a result, such similar rules of German and Russian legislation as a rule of foreign judgments recognition are expressed differently, being based upon two polar presumptions, which could even lead us to the improper conclusion that the scope of judgments being practically recognized in Germany and Russia not noticeably differs.

Joan Vivika Kutter, scientific assistant, Institute of East European Law, University of Kiel, Germany



On behalf of the German participants

Была чудная ночь, такая ночь, которая разве только и может быть тогда, когда мы молоды ...

Although it was not June when we arrived in St. Petersburg, nevertheless the visit to this wonderful city was as impressive as the „čudnye noči“ in „White nights“ by F. M. Dostoevskij. Our stay was well organized and full of St. Petersburg's spirit. The program covered scientific events (seminar sessions, visits to the Legislative Assembly and Administration of St. Petersburg and the headquarters of the Interparliamentary Assembly of the CIS), political events (just before we arrived, a member of the State Duma of the Russian Federation was murdered, and the election to the Legislative Assembly would take place only a few days past our departure) as well as cultural events (city sightseeing, visit to the Hermitage and Carskoe Celo). Although the time was short, our hosts were wise enough to save some time to social events: there were always students to show us around, join us for a cup of tea and for the

famous St. Petersburg pastry or to stroll through one of the many bars.

Exhausted by all the impressions we could rest in the „Chajka“, an apartment house adjoined to the university, where our hosts generously accommodated us.

We highly appreciate the efforts of our hosts and fully acknowledge that our stay covered so many interests because they dedicated so much time to the organization of this week.

Therefore on behalf of the German participants I would like to give special thanks to Professor V. A. Musin, Associate Professor A. V. Vershinin, to Vice Dean Professor V. V. Lukyanov and Vice Dean Professor N. I. Macnev, to the Law Department of St. Petersburg State University and to all the Russian students for all they have done to make this seminar a treasured memory.

Tim Schröder, student assistant, Institute of East European Law, University of Kiel, Germany



Russian Sales law and the Vienna Sales Convention

Aspects of the reception of legal language

It is often claimed that the new Russian civil law, especially the Russian sales law, was influenced by the United Nations Convention on the International Sale of Goods (adopted in 1980, hereafter Vienna sales law or CISG)¹. This assumption sounds plausible to a certain extent as the influence of international organizations and their legal ideas on legal reforms in Eastern Europe has been described frequently². It shall be shown here by comparison of the Russian sales law and the Vienna sales law whether the Vienna sales law, being an example of modern sales law regulations, really served as a model for the codification of the Russian civil code in 1994 and 1995.

But since sales law is still a rather huge branch of law, this comparison will be further limited to the most interesting part of sales laws: the provisions

dealing with breach of sales contracts. Attention will be given the structure of breach of sales contracts provisions (I.), the remedies available to the buyer in case of breach of a sales contract by the seller (II.) and to an analysis of the legal language used in the sales laws (III.). In some final remarks the results of the analysis will be summarized (IV.).

I. Structure of breach of sales contracts provisions

If one of the parties of a sales contract violates the contract, sales law has to provide rules determining the remedies of the aggrieved party. It is possible to structure this breach of sales contract provisions according to different systems.

One could create only a single provision allowing remedies for breach of sales contracts. This would

be a very clear and simple system, but it wouldn't be possible to distinguish between different obligations of one party when determining the amount of the remedy. On the contrary, the only possible clue available was the gravity of the breach of contract, being quite vague.

Nevertheless, the Vienna sales law follows this approach. Artt. 45, 61 CISG are just two provisions determining the remedies in case of the breach of contract by the seller or the buyer, and art. 74 CISG is even more abstract, allowing damages in case of any breach of contract.

If the assumption that Russian sales law adopted the Vienna sales law (see above) is true, Russian sales law should follow an approach similar to the Vienna sales law. This expectation is misleading: In Russian sales law almost every description of the obligations of buyer and seller is being followed by a special breach of contract rule. As Russian sales law describes many different obligations, there are also many special breach of contract rules³.

This technique, already widely used in the old Russian civil code adopted in 1964⁴, is a bit more complicated, but makes it possible to provide different remedies for different types of breach of contract. Thus Russian sales law follows a quite opposite approach as the Vienna sales law.

II. Remedies available to the buyer

According to the Vienna sales law, it is easy to determine the remedies available to the buyer in case of breach of contract by the seller (see. art. 45 CISG): The buyer may always claim damages (artt. 74-77 CISG) and require the seller to repair the lack of conformity of the sold goods (art. 46 par. 3 CISG) or to reduce the price (art. 50 CISG). If the breach of contract is fundamental (art. 25 CISG), the buyer may also require delivery of substitute goods (art. 46 par. 2 CISG) or declare the contract avoided (art. 49 CISG).

At first sight it is not so easy to determine the rights of the buyer in Russian sales law. But despite this confusing impression Russian sales law follows a simple approach. If we distinguish the breach of contract provisions according to the remedies available to the buyer, only three different kinds of remedies can be discovered:

(i) The nonfulfillment of the obligation to transfer the sold goods free from the rights of third persons gives the buyer the right to reduce the price of the goods or to rescind the contract (art. 460 civil code). (ii) The breach of a term of the contract on assortment (art. 468 civil code), on the quantity of goods (art. 466 par. 1 civil code) or the non-performance of the obligation to transfer accessories and documents relating to the sold goods (art. 464 civil code) gives the buyer the right to refuse to accept and pay for the sold goods. (iii) The transfer of goods of improper quality (art. 475 civil code), of goods without a container and/or packaging (art. 482 civil code) or of incomplete goods (art. 480 civil code) gives the buyer the right either to de-

mand completing of the goods or a reduction of the purchase price. If the breach of contract is fundamental, he may also demand replacement of the sold goods or rescission of the contract⁵.

Most of this provisions and remedies were already existing similar in the Russian civil code adopted in 1964⁶. So it can be noted again that Russian sales law seems not to be influenced by the Vienna sales law.

III. Analysis of the legal language

Taking a look at the use of legal language in Vienna sales law and Russian sales law, an astonishing similarity can be discovered. This similarity justifies the assumption of Russian sales law being influenced by the Vienna sales law at least to a certain extent, as both laws use vague legal terms on a large scale.

In the official English version of the Vienna sales law the terms "reasonable"⁷, "regular"⁸, "undue"⁹, "unreasonable"¹⁰ and "fundamental"¹¹ are used¹². Quite similar terms are used in the Russian sales law¹³: "razumyj"¹⁴, "priemlemyj"¹⁵, "suščestvennyj"¹⁶, "obyčnyj"¹⁷, "charakter tovara"¹⁸, "jasnyj"¹⁹, "nezamedlitel'nyj, bez promedlenija"²⁰, "sравnimyj, nesoižmerimyj"²¹, "obyčaj delovogo oborota"²² and "suščestvo objazatel'stva"²³.

It is also striking that in the 57 articles of chapter 30 §§ 1, 3 (general provisions on purchase and sale, supply of goods) of the Russian civil code vague legal terms are used 64 times, while in all the other provisions of the second part of the Russian civil code (chapter 31-60), comprising 543 articles, vague legal terms are used only 86 times²⁴. In contrast to this, the Russian civil code of 1964 hardly used vague legal terms at all²⁵.

This turnaround from a precise and clear language based on romanist legal thinking²⁶ to a quite vague language is approved by *Blumenfeld*, whose opinion is that this new legal language was a "concept central to business law in market systems"²⁷. But it seems to me that the lack of legal certainty is not completely compensated by the flexibility gained by the use of vague legal terms.

Additionally, the vague legal terms used in the Vienna sales law are the result of several factors not given for Russian law: As the Vienna sales law uses a uniform term of breach of contract and in principle doesn't distinguish between different types of breach of contract, vague legal terms like "fundamental" are necessary to maintain a certain flexibility. Besides, vague legal terms are helpful to debtors of obligations since their flexibility makes it possible to avoid rigid remedies²⁸. Vague legal terms were also often the only possibility to work out a compromise between different national legal systems.

IV. Summary

The Vienna sales law obviously influenced the usage of vague legal terms in the new Russian sales law, but its similarities to the Russian civil

code from 1964 are even more numerous. The adoption of vague legal terms facilitates the handling of the law in times of fast changing social, political and economical conditions like in Russia today. The price one has to pay for this flexibility is uncertainty of the law.

¹ See e.g. the rather brief statements of *Solotych*, Das Zivilgesetzbuch der Russischen Föderation, Teil 1, Textübersetzung mit Einführung, Baden-Baden 1996, pp. 61, 65, 71; *Boguslavskij*, in: *Horn/Pleyer* (ed.), Handelsrecht und Recht der Kreditsicherheiten in Osteuropa, Berlin 1997, p. 55; *Gutbrod*, Das Kaufrecht nach dem russischen Zivilgesetzbuch, Wirtschaft und Recht in Osteuropa (WiRO) 1996, p. 331; *Glöckner*, Aus der Tätigkeit der IRZ-Stiftung, WiRO 1994, p. 368; *Vitjanskij*, Graždanskij kodeks o postavke tovarov, Ekonomika i žizn' 1996, No. 22, p. 37; *Klejn*, in: *Sadikov* (ed.), Graždanskoe pravo Rossii, Čast' vtoraja, Moscow 1997, pp. 5f.; *Eliseev*, in: *Sergeev/Tolstoj* (ed.), Graždanskoe Pravo, Čast' II, 2nd ed., Moscow 1998, pp. 3f.; *Makovsky/Chochlova*, in: *Maggs/Žil'cov* (ed.), The Civil Code of the Russian Federation, Parts 1 and 2, Moscow 1997, p. 117; more detailed, however, *Volčenko*, Remedies for Breach of Sales Contracts, Parker School Journal of East European Law 1996, pp. 718f., 727, 729ff., 736f., 740.

² See e.g. *Ajani*, By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, American Journal of Comparative Law, Vol. 43 (1995), pp. 110-115.

³ According to chapter 30 § 1 of the Russian Civil Code (General provisions on purchase and sale), the seller is obliged to transfer the sold goods at the right time and the right place (art. 458), free from the rights of third persons (artt. 460-462), along with accessories and documents relating to the goods (art. 464), in the right quantity (art. 465), in the defined assortment (art. 467), in a suitable quality (artt. 469-475) and complete (art. 478).

⁴ *Klejn*, in: *Sadikov* (ed.), Kommentarij k graždanskomu kodeksu rossijskoj federacii, časti vtoroj, 2nd ed., Moscow 1998, art. 506 pt. 1 (p. 72). The breach of contract provisions of chapter 21 of the Russian civil code 1964 (purchase and sale contract) concerning defects in title (artt. 241, 250, 251 civil code 1964), non-performance (art. 243 civil code 1964) and defects of quality (art. 246 civil code 1964) are almost identical with the corresponding provisions of the new Russian civil code. Also chapter 24 of the civil code 1964 (supply of goods contract) already distinguished between breach of the term of the contract on the quantity of goods (art. 259 civil code 1964), on the assortment (art. 260 civil code 1964) and on the transfer of incomplete goods (art. 264 civil code 1964).

⁵ The distinction between simple and fundamental breach of contract indeed reminds of the Vienna sales law, but I will come back to this in section III (analysis of the legal language).

⁶ See e.g. artt. 246, 250 civil code 1964.

⁷ Artt. 8, 16, 18, 25, 33, 38, 39, 43, 44, 46, 47, 48, 49, 60, 63, 64, 65, 72, 73, 75, 76, 77, 79, 85, 86, 88 CISG.

⁸ Art. 9 CISG.

⁹ Art. 19 CISG.

¹⁰ Artt. 34, 35, 37, 46, 48, 86, 87, 88 CISG.

¹¹ Artt. 25, 46, 49, 51, 64, 70, 72, 73 CISG.

¹² The (also) official Russian version uses the terms "razumnyj", "postojanno", "bez promedlenie", "nerazumnyj" and "suščestvennyj".

¹³ Only §§ 1, 3 (general provisions on purchase and sale, supply of goods) of chapter 30 of the Russian civil code are taken into consideration here.

¹⁴ Artt. 464, 466, 468, 470, 477, 480, 483, 510, 514, 515, 518, 519, 520, 524 civil code.

¹⁵ Art. 523 civil code.

¹⁶ Artt. 475, 523 civil code.

¹⁷ Artt. 468, 469, 470, 474, 478, 481, 484, 485, 519, 524 civil code.

¹⁸ Artt. 455, 475, 481, 482, 483 civil code.

¹⁹ Art. 457 civil code.

²⁰ Artt. 513, 514, 518, 519, 522 civil code.

²¹ Artt. 483, 524 civil code.

²² Artt. 459, 474, 478, 508, 510, 513 civil code.

²³ Artt. 467, 475, 479, 480, 481, 482, 485, 486, 508, 510, 515 civil code.

²⁴ In artt. 567, 577, 580, 585, 593, 599, 605, 611, 614, 616, 619, 620, 621, 626, 662, 663, 668, 681, 693, 698, 709, 715, 716, 719, 720, 721, 723, 724, 740, 744, 748, 753, 790, 792, 806, 821, 823, 842, 848, 853, 862, 863, 864, 865, 873, 875, 888, 889, 891, 893, 894, 895, 899, 910, 924, 941, 944, 959, 960, 961, 962, 973, 980, 981, 985, 992, 993, 995, 998, 1000, 1003, 106, 1021, 1043, 1057 civil code.

²⁵ Only in artt. 163, 164, 167, 168, 170, 171, 172, 173, 174, 177, 178, 207, 247, 248 civil code 1964.

²⁶ See in this regard also *Sacco*, The romanist substratum in the civil law of the socialist countries, Review of Socialist Law Vol. 14 (1988), pp. 65-86; *Moss*, Russian legislation and foreign models. Some observations on comparative law, Europa e diritto privato 1998, pp. 523-550.

²⁷ *Blumenfeld*, Russia's new civil code: The legal foundation for Russia's emerging market economy, The International Lawyer 1996, p. 496.

²⁸ *Schlechtriem*, Einheitliches UN-Kaufrecht, Tübingen 1981, p. 8 fn. 41, also mentions that the use of vague legal terms could be traced to the results of negotiations between industrial countries and third world countries during the drafting of the Vienna sales law.

Frauke Beck, student assistant, Institute of East European Law, University of Kiel, Germany



Russian International Contracts Law

The applicable Russian International Law on contracts in comparison to the Russian Draft Law

I. Introduction

The International Private Law on contracts has its practical importance because of the continuous growing of international sale of goods and private mobility, but of course it is of utmost practical importance to pay also always attention to the priority of application of unified standard law like the Convention on contracts for the international sale of goods of 1980 (hereafter Vienna sales law)¹. In Russia, art. 154 of the Fundamentals of the Civil Legislation determines the priority of international treaties. The Russian Federation is as legal successor of the former Soviet Union member of the Vienna sales law since Dezember 24th, 1991². As far as neither Vienna sales law or further international treaties and agreements are applicable, the applicable law is determined by the conflict of law provisions of the forum state.

The Fundamentals of the Civil Legislation of the USSR and the Union Republics of 1991³ contain the definitive conflict of law norms. Later the Fundamentals became the Fundamentals of the Russian Federation, but only the words "USSR" and "Soviet" were replaced by "Russian Federation" and "Russian", while the rest of the legal text maintained. These provisions shall now be replaced by part III of the Draft Law on the Civil Code of the Russian Federation⁴ in the future, whose division VII deals with Private International Law. This short article will point out some developments relevant to its subject.

II. Russian International Law on Contracts

1. Principle of party autonomy

The choice of law is ruled by the principle of party autonomy. Upon conclusion of a contract the parties are able to determine the law applicable to the contract. By art. 166 pt. 1 of the Fundamentals the rights and duties from foreign-economic transactions are determined by the choice of law upon conclusion of a contract or thereafter by mutual agreement. Also the general rule in art. 165 pt. 2 of the Fundamentals was formulated with proviso of the choice of law, is here obvious the difference between domestic and foreign-economic transactions. Art. 1254 pt. 1 of the Russian Draft Law gives a unitary formulation for the principle of the choice of law by parties.

One exception is permitted from this basic rule: The choice of law by parties of a contract for the creation of a joint-enterprise with participation of

foreign legal persons or citizens. The law applicable to such a contract is the law of the country where the person was founded. The Fundamentals as well as the Draft Law contain this exception (art. 166 pt. 3 Fundamentals, art. 1257 Draft Law). The Draft Law further adopted a restrictive clause of the choice of law principle in case of domestic factual situations⁵.

2. Types of choice of law

Art. 1254 of the Draft Law contains three extensions relating to the regulations of the Fundamentals regarding (i) implied choice of law, (ii) ex post facto choice of law and (iii) the possibility of splitting of the proper law of a contract.

(I) The Russian law in force refers to the real intention of the parties which has to be expressed in the contract, the choice of law must be expressed clearly. In contrast to the Fundamentals, the Draft Law will also consider an implied choice of law, if it directly derives from the conditions of the contract and the circumstances considered in their totality (art. 1254 pt. 2 Draft Law).

(II) Art. 166 pt. 1 of the Fundamentals gives parties to a foreign-economic contract the possibility to choose the applicable law by mutual agreement even if the contract has already been concluded. They are able to change the law applicable for this moment by the right of understanding or objective rules. The questionable moment of effectiveness of ex post facto choice of law shall be determined by art. 1254 pt. 3 Draft Law as the moment of the conclusion of the contract without prejudice to the right of third persons.

(III) According to the wordings of pt. 4 of this article the applicable law may be chosen as a whole or to individual parts of the contract.

3. Aspects of the applicable law in the absence of a choice-of-law agreement

In the absence of a direct expression of the will by the parties the Russian governing law differs between a general rule for determining the applicable law and a conflict of law rule for foreign economic contracts. Foreign economic contracts are commercial transactions between legal entities of different nationalities⁶. In absence of a choice of law a concrete conflict of law rule relating to thirteen types of contracts is provided by art. 166 pt. 1 sec. 2 of the Fundamentals. Art. 166 pt. 5 of the Fundamentals contains the same formulation as a general rule. In the case of foreign economic contracts the statute

of contract doesn't refer to the place of contracting (art. 165 pt. 2 Fundamentals) but to the place of residence of the party with the characteristic fulfillment obligation. The Draft Law abolished the differentiation between this two types of contracts, and by now there are nineteen different contracts mentioned.

Two more characteristic changes in the legal basis have to be mentioned: First art. 1255 Pt. 2 Draft Law as a new regulation demonstrates the effects of the Russian Law on real estate on the legal development of International Private Law. The Draft Law contains a conflict of law norm for immovables even though the political questioned law is not in force yet. Second, according to art. 1255 pt. 4 Draft Law in case of the impossibility of determining the performance having decisive significance for the content, the law of that country shall be applied with which the contract is most closely connected.

III. Concluding remarks

In conclusion the Russian legal development shows a tendency to refer to the characteristic fulfillment. Important is also the codification of the principle of the closest connection of the contract. The Draft Law is not differing between domestic transactions

and foreign-economic contracts. This progressive legal development of Russian International Law on contracts shall cause a further step liberalising the economic activities and shall strengthen the market-economic structures in Russia.

¹ The German text can be found in *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht, Nr. 48.

² See German Bundesgesetzblatt (BGBl.) II 1995, 814; with a reservation concerning art. 96.

³ Law adopted on May 31st, 1991, Vedomosti S^oezda narodnykh deputatov SSSR i Verhovnogo Soveta SSSR, No. 26, Juni 26th, 1991, Pos. 733; German translation by *Boguslavskij*, Ausarbeitung neuer Kollisionsnormen in der Sowjetunion und in den Mitgliedstaaten der GUS, IPRax 1992, pp. 403-405.

⁴ Russian text available in Rossijskaja Gazeta, November 30th, 1996; German translation by *Boguslavskij/Höfer*, Neuere Entwicklungen im russischen Internationalen Privatrecht, IPRax 1998, pp. 54-56.

⁵ This clause was established in the Draft Law in Oct. 1997 as art. 1254 pt. 5.

⁶ See in this regard e.g. *Boguslavskij*, Meždunarodnoe častnoe pravo, 3rd ed. Moscow 1998, chapter 8, § 1.

Morten Fogt, University of Kiel, Germany



International Property Law in Russia

I. Introduction

The subject here is the international property law in Russia¹ compared with the legal system in other countries, especially German and Scandinavian law. The question which conflicts rules apply to the proprietary aspects of a contract is of paramount importance for the international business and financing. In the first place because of the great importance of the international property law for trade and commerce between the countries. Secondly because the national development in every country depends to a great extent on a good functioning international trade.² As one of the most pressing tasks of international law of today, one should see the creation of secure international trade relations. If it is more or less possible to calculate contract risks, businessmen and international banks will feel secure. They will therefore not keep away from foreign markets, and the flow of goods, per-

sons, services and capital will have the best conditions.

The international contract and property law are the main parameters, when these aims are to be realised. They have equal importance. Had for example two businessmen concluded a contract of international sale and thereby chosen the law of a country they are both familiar with, they could by mistake think that they are secured. However, the proprietary rights arising out of the contract could easily be governed by a another foreign law. That could lead to serious surprises for one or both parties, when the real rights created under the contract according to the foreign law do not hold against third parties. Thus, it may be right to say, that in such a case the contract is not worth any more than the paper on which it is written.

The Russian international property law and that of other countries are so definitely of great importance

in the every day life of international business. If there is a thorough knowledge of the international property law of other countries, it will be possible to calculate the effect of a contract between two parties. Furthermore, a certain form of unification of the law would not be a distant possibility anymore. It should here be mentioned, that since the late sixties the Common market countries have wished to uniform the international property law in the member states, however there is in this matter still a long way to go.

II. Subject and aim of the research

In this short research some of the conflict issues relating to property will be briefly considered. The aim is to give a presentation of the ground rules of the international property law in Russia and a short comparison to other countries, Germany and Scandinavia. The main part will be dealing with the general principles of property law. In particular party autonomy will be addressed, because it forms the leading motif of how the concrete conflict rules are drawn up.

III. Concept of international property law

1) In a general and comparative view

The international property law covers traditionally all questions concerning proprietary rights or real rights, also in roman law terminology called rights in rem.³ The rules of conflict in the international property law have different background and purpose compared with the rules of international contract law. Issues relating to property should therefore be well-defined and separated from questions arising out of contractual obligations.⁴ The latter is governed by the international contract law, where party autonomy is given, so to speak, a lot of space.⁵

The concept of international property law should in my opinion be seen as a supplement to the national internal property law.⁶ It only covers questions, which are classified as relating to proprietary rights. This classification is the key to the application of either conflict rules of contract law or property law. It is in general governed by the law of the forum (lex fori), that is the law of the deciding court.⁷ For example the Russian draft from 30. Nov. 1996⁸ and the later draft from 4. March 1998⁹ to the new codification of the private international law of Russia provide in art. 1224 the classification after the lex fori. So the law of the court deciding the case classifies any legal question arising in accordance to its own national internal law.

The essential question, which will have a decisive effect on the result of a case, is: What issues belong to the international contract law and what issues are instead governed by the rules of the international property law?

2) Concept of Russian international property law

As a consequence, the concept of the Russian international property law depends on, what in Russian national law is regarded as proprietary rights and what is not. In particular, the rules in the former Soviet Union and the rules of the Russian Federation should today be seen in a historical perspective. Special attention should therefore be made to the creation of the socialist system of property and its influence on the development.¹⁰ One could possibly not deny that a legal heritage from the former socialist system has had some influence as well as any other country that has had its own legal history and tradition.

The new constitution of the Federal Republic of Russia from 1993¹¹ has made a decisive change in the legislation in Russia. The fundamental constitutional ground principles are laid down here, including the constitutional right of private property in art. 8 and art. 35.¹² This constitutional right of property should therefore be the bearing part of the international property law. The international property law must be committed to these provisions in the constitution. In the same way the material rules in the civil code of Russia will be submitted to the constitutional principles.¹³

IV. Sources of Russian international property law

At least since the beginning of the twentieth century there have been conflict rules in Russia, first developed by jurisprudence and later codified in the civil laws.¹⁴ Apart from a few conflict rules in the introductory law to the civil code of 31. Oct. 1922 art. 8 and appendix 1-2, there were no conflict rules in the first civil code of USSR.¹⁵

The international property law was therefore at first developed in case law. So has the Supreme Court of Russia stated in 1931 for interstate matters that the law applicable for realisation of rights of property is the law of the place where the property is located.¹⁶ In the later Soviet legislation rules of international property law appeared in the principles of civil legislation of USSR of 1961,¹⁷ which were reformed in a supplement in 1977.¹⁸ The civil rules of conflict law were more detailed in this reform. The basic rule of the international property law was, according to older jurisprudence for interstate affairs, still the lex situs. But a significant exception was provided in case of foreign trade transaction, where the place of the conclusion of the contract or the party autonomy should decide the choice of law. These conflict rules were taken over in the civil law of the Soviet Republics. The Russian civil code was changed in June 1977¹⁹ and rules of international property law were given in art. 566 sec. 2-3 and 556-3.²⁰ The content was that of the principles of 1977. Therefore were the rules based on the system and structure of a socialist state.

Because of the development towards an open society and a more or less free market economy in the 1980th a change of the private international rules was needed. With the breakdown of the USSR and

the forming of the Union of Independent States²¹ a new area and also the reform of the Soviet legislation begin.²² On this background a new codification of the international private law of USSR was prepared. These new principles of civil legislation on the subject of private international law didn't enter into force before the collapse of the USSR in the fall of 1991.²³ Therefore, it could only serve as an model law for the other former Union Republics of the USSR.²⁴ The reform contains a new line of thoughts and the attempt to adapt to the changed economic situation.²⁵ The Russian Federation has enforced the principles half a year later on the 3. August 1992, so that they are the present law of Russia today.²⁶

A model law from 30. Nov. 1996 to the international private law has been worked out by the Community of Independent States. The Russian 1996 draft²⁷ and the later Russian drafts²⁸ are formed after this model law, nevertheless are there in the later drafts made some important changes. None of the drafts have yet entered into force in Russia.²⁹

V. General principles of the Russian international property law

1) Purpose and function in general and Interest of third parties

The purpose and function of international private law have a close connection with the interests of the parties involved. There are many interests to consider; the interests of the parties of the contract, the relationship to third parties such as creditors and finally public interests.

Especially the interest of third parties is questioned in the law of property. It can be explained by the fact that proprietary rights have effect against everyone and are unlimited in principle. These interests of third parties conflict mostly with the interests of the parties of the contract. The contracting parties want as much freedom of contract as possible and are by no means interested in restrictions forced upon them by obligatory rules. On the other hand can third parties not feel secure when their legal position is to be decided solely by the contracting parties. We here face a well-know dilemma between the freedom of contract and the protection of third parties.

2) Case law and provisions in Russian international property law

In the first part of the 20. century the Soviet law of international property was built up upon the Supreme Court ruling of 10. Feb. 1931, which adopted the *lex situs* for proprietary questions. The decision concerns only interstate affairs. It is however likely that the decision also had affect on international cases and the later development.³⁰

There were no rules of international property law in the Soviet principles of civil legislation of 1961, but only a conflict rule concerning the obligations

of the parties was foreseen in art. 126.³¹ At that time the *lex situs* according to Rabel was a universal principle, manifested in abundant decisions and recognized by all writers.³² He thereby refers to legal provisions and practice in 23 countries in and outside Europe, among others to Czechoslovakia (art. 36 of the international private law act), Polen (art. 6 of the international private law act) and even to the mentioned Supreme Court ruling of the USSR of 10. Feb. 1931 and the American Restatement of 1934. Apart from a confusing reference to party autonomy in the Chilean code art. 16, the parties could not determine the applicable law.³³

The mentioned reform of the private international law in the principles of civil legislation in 1977 gave for the first time rules on international property questions. Above all, there was a new distinction between interstate law conflicts in the USSR and those conflicts, which arise in connection with other foreign countries. In art. 126 sec. 2 of the principles of 1977 the party autonomy was extended to the choice of law by creation and termination of the right of ownership to a thing. But, as we have seen, only in case of foreign trade transactions with countries outside the Union.³⁴ The interstate conflict law kept the principle of *lex situs* in art. 18. The provisions in the principles of 1977 were as basic principles adopted without any change by the Republics of USSR in their civil codes, among them by Russia in the RRC of 1977 art. 562-569.³⁵ In the periode from the late 1970th to the late 1980th was there as well-known a dramatic development in the social and economical situation in eastern Europe, and not least in Russia. The traditional Soviet view of property, which were embodied in the 1977 Constitution, were challenged by the need for economic reforms. The main goal was to adapt to the changed situation and the opening of the society to the outside world.³⁶ Nevertheless were the international private law on foreign trade transactions in the principles of 1977 obviously of significant influence by the drawing up of a totally new codification of the international private law.³⁷ The regulation in the principles of 1991 concerns questions of ownership and not other proprietary rights. In the same principles the provision of party autonomy in the international property law is maintained and thereby further extended. According to the present rule of today the principle of the autonomy of the will of the parties is not limited to international sale of goods. Instead the rule of art. 164 sec. 3 of the 1991 principles covers any legal transaction over a real thing (in German „Vermögensgegenstand, der Gegenstand eines Rechtsgeschäft ist“).³⁸

In the 1996 draft is the same provision with free party autonomy foreseen in art. 1247 sec. 1, however with an restriction in art. 1250 in case of protection of property right of ownership contained. The provisions in the 1996 draft concerns according to art. 1247 Sec. 2 all proprietary rights, both own-

ership and other proprietary rights. The Soviet tradition of party autonomy is here kept unchanged. The decisive change has come in the year of 1998, where Soviet and partial Russian tradition of party autonomy in the internationale property law has been broken. That is in case the decision in the new 1998 draft, where artt. 1245-1246 provide firm and objective conflict rules excluding party autonomy in any proprietary matter. The later version from 6. Jan., 1999 is in line with this view. It provides in artt. 1331 and 1332 a firm rule of the *lex situs* for all proprietary matters and has only two exceptions. One by the goods in transit in art. 1331 sec. 2 and another by the acquisitive prescription in art. 1332 sec. 3. Unfortunately some reasonable exceptions from the rule of *lex situs* by means of transport and by objects subject to state registration are let out in the latest draft from 1999. These provisions were in fact contained in the 1996 draft and 1998 draft.

VI. Comments

In my opinion is it very doubtful whether a wide unlimited party autonomy should be accepted in the international property law. My reasons are in short that such a provision originally belong to the law of contract, in the material law as well as in the conflict law. Here is a wide freedom of contract foreseen with only few obligatory rules as an exception. In the property law is it without question the other way around. The main purpose of the rules are the protection and interest of other persons in legal relations and not the parties of the contract. The rules are for that reason in general obligatory. The question is hereafter whether a restricted party autonomy like the provision in art. 164 sec. 3 and 4 of the principles of 1991 and art. 1247 sec. 2 in connection with art. 1250 of the 1996 draft is recommendable or one instead should recommend a conflict rule party autonomy like the 1998 draft and the 1999 draft?

Even a party autonomy with an reservation in case of protection of the owner or the holder of other proprietary rights is questionable and gives hardly a third party a position where he can feel secure. In the first place do not only third parties who already have achieved a real right need protection and predictability. Also third parties who have not yet contracted (for example considering to give a credit in return for a security) need clear and predictable legal relations. That is the case in both material and conflict law. Above all the party autonomy in the international property law would turn this purpose of the *lex situs* rule up side down. No one could by the question of the applicable law rely on the location of a real thing. The owner or the holder of a real right would have to prove his right violated, before he can claim the application of the law of the *situs*.

The main reason not to advocate for a party autonomy in the international property law is however not legal doubts, but the negative effects on the economic situation, development and so the well-

fare of the people. Foreign investors, banks and businessmen would hold back their activities from the Russian market if their legal position in material law and international law would be unsecure and unpredictable. Especially their position as third party in the law of property will attract great attention. The conflict rules play, as a consequence of the differences between the national property laws of Europe here a significant role. For the sake of good functioning national and international trade and for the sake of the future development in Russia, there should be a clear conflict rule for proprietary questions predictable for third parties. In the end this can only be achieved with the rule of the *lex situs* and the few absolute necessary exceptions from the rule. These exceptions must in my opinion also be clear and visible for outstanding third parties.

All together this acquires that the party autonomy is excluded from the international property law and solely left room in the international contract law. This solution in the new Russian drafts should be maintained and can after my opinion be recommended.

¹Available material in German and English have been utilised and because of the language barrier material in Russia could not be taken into account. One exception is made by the new Russian draft of the third part of the new civil code from Jan. 6, 1999, where a unpublished translation of the Russian text is used.

²Lando CML Review 35, p. 821-831, 821, 1998 about the idea of the European Common Market: "the more freely and abundantly these (goods) can move across the frontiers, the wealthier and happier we will be".

³Rabel, *The conflict of law*, volume four, 1958 p. 3-5.

⁴Rabel, *The conflict of law*, volume four, 1958 p. 34 "transfer of title is sharply distinguished from promises to transfer title".

⁵See art. 3 and 4 in the Rom Convention on the law applicable to contractual obligations from 19. June 1980.

⁶Muenchener Kommentar-Kreuzer, nach Art. 38 Anh. I Rn. 1.

⁷For example the leading opinion in Germany and in Scandinavia.

⁸Hereafter referred to as the 1996 draft, see IPRax 1998 p. 54 translation in German.

⁹Hereafter referred to as the 1998 draft.

¹⁰M.M. Boguslawskij, *Private international law: The Soviet approach*, Moscow 1986, translated into English 1988 p. 1 ff.

¹¹A. Trunk, WiRO 1994 p. 33.

¹²A. Trunk, WiRO 1994 p. 35.

¹³Compare the function of German constitutional law, Art. 14 of the German Constitution (*Grundgesetz*), see Baur/Stürmer, *Sachenrecht* 1992 p. 27; "The superior thought, which rule the german property law, is the confession to private property" (my translation); Muenchener Kommentar-Kreuzer, nach Art. 38 Anh. I Rn. 14; Staudinger-Stoll, *Internationales Sachenrecht*, Rn. 58-63.

¹⁴I restrict my research to the development in Russia in the 20th century.

¹⁵Freund, *Das Zivilrecht Sowjetrußlands*, Berlin 1923 p. 106-110.

¹⁶The Supreme Court of Russia 10. feb. 1932, see Makarov, *Quellen des Internationalen Privatrechts*, 2 Aufl., 1953 UdSSR ; Marakov *Osteuroparecht* (15) 1969 p. 1 ff.

¹⁷Hereafter referred to as „the principles of 1961“.

¹⁸Hereafter referred to as „the principles of 1977“.

¹⁹Hereafter referred to as „RCC of 1977“.

²⁰Frenzke, *Das Zivilgesetzbuch und das Ehe- und Familien Gesetzbuch der Russischen Sowjetrepublik* (1988) p. 12 and 240-241.

²¹Community of Independent States, in german „Gemeinschaft Unabhängiger Staaten (GUS)“.

²²See IPRax 1992 p. 401.

²³Hereafter referred to as „the principles of 1991“.

²⁴This model law on international private law of 1996 was not available for me in german or english language and I could therefore not make a comparison to the Russian draft of 1996.

²⁵See IPRax 1992 p. 401 ff. p. 403-405.

²⁶Boguslaskij, *International Private Law*, 3 edition, 1998.

²⁷See in German translation IPRax 1998 p. 54 f.

²⁸There are two later drafts : Draft of March 4, 1998, print of a translation into English of 14.12. 1998 from “<http://wis.cso.uiuc.edu/law>“ and the draft of Jan. 6, 1999.

²⁹See in German translation IPRax 1998 p. 54 f.

³⁰Makarov, *Kollisionsnormen in den Grundlagen für die Zivilgesetzgebung der Sowjetunion und der Unionsrepubliken Osteuropa recht* (15) 1969 p.5-6.

³¹Meder (Herausgeber) *Grundlagen des Zivilrechts und des Zivilprozeßrechts der UdSSR*, Berlin 1962 p. 73 ff., 75.

³²Rabel, *The conflict of law*, volume four, 1953 p. 30-31.

³³Rabel, *The conflict of law*, volume four, 1953 p. 31 with note 109.

³⁴See Makarov, *Quellen des Internationalen Privatrechts*, 3 Aufl. 1978 p. 247.

³⁵Frenzke, *Das Zivilgesetzbuch und das Ehe- und Familien Gesetzbuch der Russischen Sowjetrepublik (RSFSR)* 1988 p 12, 17.

³⁶Boguslawskij, IPRax 1992 p. 401.

³⁷Art. 164 in the principles of 1991.

³⁸See Boguslawskij in IPRax 1992, 404, translated into German.

Tim Schröder, student assistant, Institute of East European Law, University of Kiel, Germany



Legal Cheating in Russia

Or: How Russian law students use the internet

The blessings of the internet have finally entered Russian universities: Many universities have their own netsites, and writing emails is a quite common means of communication among Russian students. But Russian law students are using the internet also for purposes which do not amuse the universities.

In Russia today exist several internet databases containing lots of “referaty” – all kind of students exercise works which are of great importance in Russian (legal) education. The biggest collections are situated in Moscow (“Moskovskaja Kollekcija REFERATS“, <http://www.referat.ru/referat/>, or, the same, <http://www.referats.corbina.ru/referats.html>) and St. Petersburg (“Central’nyj Bank rossijskich REFERATOV“, <http://www.fem.ru>), but “referaty“ can also be found in Orenburg, Perm’ and Dnepropetrovsk (Ukraine) (Links to this collections are available at the St. Petersburg collection).

The collections cover works from almost all fields of science, including, being of special interest here, legal works. Under the caption “Pravo“ one can find

in the Moscow collection more than 450 “referaty”, in St. Petersburg around 425. The works are arranged in alphabetical order with regard to their subjects. From “A“ like “Avtorskoe pravo“ (copyright law) to “JU“ like “Juridičeskie lica“ (legal entity) all fields of Russian and Ukrainian law are covered, and there is also a reasonable amount of comparative works dealing with foreign legal systems.

Most textfiles are available in the microsoft word format, but eventually rather “exotic“ cyrillic font sets and file formats make it difficult to decipher the texts. Each file comes together with a separate info file, where sometimes even is recorded in which universities and with which professor the referat already has been “used“. Both quality and extent of the works vary on a large scale: while even “diplomas“ (a students’ final graduation thesis) can be found, most works are rather short and comprehensive.

Russian law students confirmed that these referat databases are frequently used by many students, at least at the state universities. In German legal education no referat databases are known to exist – likely a

consequence of the fact that referats have not this big importance in Germany. But some clever German secondary school pupils have invented homework databases in the internet, see e.g. *Slodczyk*, "Schum-

meln online: Fertige Hausaufgaben zum Herunterladen" (Cheating online: homework ready for download), DIE ZEIT Nr. 17/1998, S. 65.

Hermann Lindhorst, student assistant, Institute of East European Law, University of Kiel, Germany



The Bundesgerichtshof Backstage Tour

Excursion on the occasion of the seminar "New German Bankruptcy Law"

Studying law at a university is quite a theoretical matter. There are only few possibilities to observe how law is really being made. In most cases students do an internship for about a month at a local law court to learn all about car accidents, shoplifters and other minor offences.

In contrast to anglo-american countries law in Germany is being created primarily by the legislative bodies. As a matter of fact, some of the students may have visited once the German *Bundestag* or a parliament of the Lander, like the *Burgerschaft* in Hamburg or the *Landtag* in Kiel - but normally not the *Bundesgerichtshof*, Germany's Federal Supreme Court, in Karlsruhe. This is a pity, as Germany is reigned by coalitions in the past few years, the legislative bodies more and more tend to create laws in which essentials things are being left open for further jurisdictional interpretation.

Karlsruhe is often being cited as the Germany's "capital of law". After WW II the former german Lander Baden and Württemberg were united. New capital of Baden-Württemberg was Stuttgart. As a compensation the former capital of Baden, Karlsruhe, received the Federal Constitutional Court (*Bundesverfassungsgericht*) and, even more important, the *Bundesgerichtshof*. (This led after Germany's reunification to the problem whether to keep those Courts in Karlsruhe or to go back to Leipzig where the former Reichsgerichtshof was located.)

Arriving at the *Bundesgerichtshof* we were welcomed by Mr. Kirchhof, member of the IX. Senate, who guided us through the holy masonries of the highest German court. First we had a pleasant and informative talk with the head of the library, Mr. Pannier. He explained us how to achieve and to maintain one of Germany's biggest libraries. He also answered particular interesting questions, ie. how new media is being accepted by mostly grey-haired judges and to the famous quarrel whether to go back to Leipzig or not.



Participants are questioning the judges Mr. Kirchhof, Dr. Paulusch, Dr. Krefl, Dr. Fischer (f.t.l.)

After this we met the IX. Senate in a courtroom of the *BGH* and took the opportunity to ask questions on the cases we would see one day later. Certainly there were also quite a few general issues to answer for the Federal judges.

At the first halftime Mr. Kirchof explained how the *BGH* is organized and how a judgement is formed from the beginning to the end: first one of the judges is nominated as a correspondent to a certain case. This correspondent is doing the essential research work. At his side assists a scientific helper - who is normally a judge sent from a district court or from a court of appeal. Being a scientific helper at the *Bundesgerichtshof* means being a candidate for working as a judge at the highest German court. Having finished the research work (and sometimes having done a hearing), the Senate discusses the crucial questions and comes to a decision. The Senate also considers whether to include the case into the official edition „*Entscheidungen des Bundesgerichtshofes - BGHZ*“ („*Decisions of the Bundesgerichtshof*“). This edition is owned by all the Federal judges and the royalties are mostly used for court outings. It was surprising to

experience on the one hand a certain team-spirit of the IX. Senate and on the other hand the lack of a good working communication between the Senates: The judges told us that they sometimes find relevant decisions throughout the newspaper (which is positive regarding the quality of the newspapers in Karlsruhe..)!

The second halftime took place at a well-known but expensive restaurant in Karlsruhe. We continued our question-time and talked not only about career-chances and politics (noticing interesting opinions at that point about the *Bundesverfassungsgericht*, the Constitutional Court) but also about Karlsruhe, german cuisine and the difference between Schwaben (Swabias) and Badenern (Badeners).

On the way back to Kiel we made a stop-over in Cologne for a meeting with Prof. Uhlenbruck, who is, having solved some of Germany's famous bankruptcy cases, an eminent authority in the field of insolvency law. At a lunch with a gorgeous soup of lentils we got to know, just as we got at the *Bundesgerichtshof*, interesting background-details.

News & Events

- The **Zeit-Stiftung Ebelin und Gerd Bucorius** (Hamburg) is supporting the German-Russian study program of the Institute of East European Law this year with all together DM 5.000,-. Of this amount DM 3.500,- are designated for two scholarships for Russian students. DM 1.500,- are available to support a lithuanian scientist participating in a joint seminar of the Institute and the Department of Research in East European Law (University of Hamburg) in July.
- From **July 7th till July 9th, 1999**, the Institute of East European Law (University of Kiel) and the Department of Research in East European Law (University of Hamburg) will organize the joint seminar "Public and private banking law in Eastern Europe". Several lecture topics are still available.
- On **Nov. 11th, 1999**, the Institute of East European Law hopes to celebrate its fortieth anniversary with the conference "The law of building contracts in Eastern Europe". Along with a guest from Moscow, Dr. Solotykh (Institute of East European Law, Munich), Prof. Dr. Thode (judge at the German Federal Supreme Court of Justice, Karlsruhe) and Mrs. Bode (Hochtief AG, Frankfurt/Main) will report on topics of the law of building contracts in Eastern Europe. For further information please contact the Institute.
- The Legal Secretariat of the Interparliamentary Assembly of the Community of Independent States (CIS) has asked Prof. Dr. Trunk to contribute to a working party elaborating a draft for a CIS Model Code of Civil Procedure.