BRITISH RUSSIAN LAW ASSOCIATION

NEWSLETTER

SPRING 2009

WELCOME

Dear Member,

In conjunction with the launch of our website (www.thebrla.com) at the end of last year, we are pleased to re-launch our Newsletter which will now be provided in an electronic format and is planned to be a quarterly feature.

The purpose of the Newsletter is twofold:

- To keep you informed of our activities
- To highlight interesting and important issues and developments of Russian law and associated matters. If you would like to share your knowledge and expertise with BRLA members, get in touch!

BRLA EVENTS - A REVIEW

➢ *FOREIGN INVESTMENT SEMINAR - November 2008*

The last event organised by the BRLA in 2008 was a seminar on **"THE LAW ON FOREIGN INVESTMENT IN STRATEGIC INDUSTRIES – Practical Advice for Foreign Investors".**

The seminar was organised together with *Baker & McKenzie LLP* who also sponsored a post-seminar drinks reception, and took place at their offices at 100 New Bridge Street in London on 24th November 2008.

The topic of the seminar was the long awaited new Law On Foreign Investment in Strategic Industries ("New Investment Law") which was passed by the State Duma and subsequently signed by President Putin on 29th April 2008. The New Investment Law came into force on 7th May 2008 and generated mixed reviews in the press. It is viewed as a major milestone in the state regulation of foreign investments in Russia. On the one hand, the New Investment Law is in line with the Putin policy of bringing the exploitation of the natural resources back under the state control and restricting access to such industries by foreign investors. On the other hand, it clarifies the "rules of the game" for foreign investors by identifying relevant limits and restrictions and putting in place approval procedures. From this point of view, the New Investment Law has been said by many to be a positive step in eliminating uncertainty, instability and political risks usually associated with foreign investment in Russia.

The New Investment Law it identified 42 industries that are considered "strategic" from a national security perspective. A foreign investor wishing to invest in such industries is required to obtain government approval before purchasing shares over a specified quantity - over 50% of the capital in most strategic industries or more than 10% in mineral resources industries important for the national defence, such as, e.g. oil industry. The approval threshold is stricter for foreign governments wishing to invest in the strategic industries (25% share and 5% share respectively).

Analysis of the New Investment Law and comparisons with similar laws in other countries suggest that it does not impose abnormal and burdensome restrictions, as might be feared on initial reading. The New Investment Law is in line with similar steps taken by other countries seeking to restrict and control foreign investment in strategic industries.

The pros and cons on the New Investment Law were fully explored at the seminar by our guest speakers **Gordon Low** *(Baker & McKenzie, London)* and **Sergei Voitishkin** *(Baker & McKenzie, Moscow)* who gave a full introduction of the New Investment Law, outlined the sectors of the economy affected by the new rules and analysed the effect they have on foreign investors.

Sergey Voitishkin then explained in detail the approval procedure introduced by the New Investment Law and the right of appeal of a refusal.

An interesting and frequently underestimated "non-legal" angle of the government approval process was highlighted by **Dmitry Evstafiev** of *Cros Public Relations Company, Moscow* who emphasised the role of lobbying in the permission process. He explained the intricacies of lobbying in today's Russia and presented his topic in a witty and engaging manner which was well received by the audience.

The presentations were accompanied by detailed and very helpful *slides* which, with the authors' permission, we intend to make available shortly on our website.

The BRLA would like to express its gratitude and appreciation to Baker & McKenzie LLP for their help in organising the seminar and for their sponsorship and to the speakers for the expert contributions.

➢ *BRLA 2009 AGM – 4 February 2009*

On the 4th February the BRLA held its **ANNUAL GENERAL MEETING**, drinks reception and dinner at the Garrick Club in Covent Garden.

The following were elected to the Executive body and the Committee of the BRLA for 2009.

Executive body:
The Chairman – Professor Bill Bowring
The Vice-Chairman – Michael Swainston QC
The Secretary – Rupert D'Cruz
The Treasurer – Pavel Klimov
The Social Secretary - Ksenia Putilina

Committee:
(1) Robert Brown (Corker Binning)
(2) Katerina Haslam-Jones (Pavda, Haslam –Jones & Partners)
(3) Andrew Tobin (Clyde & Co)
(4) Arthur Abdulin (Almaty Chamber of Commerce)
(5) Ludmila Lipskaya (Pavda, Haslam –Jones & Partners)
(6) Tamar Halevy (Lewis Silkin)
(7) Nellie Alexandrova (Denton Wilde Sapte)
(8) Stephen Wiggs (Winkworth Sherwood)
(9) Pavel Klimov (Unisys)
(10) Ksenia Putilina (Peter Hamro Mining)
(11) Bill Bowring (Birkbeck College, Field Court Chambers)
(12) Michael Swainston QC (Brick Court Chambers)
(13) Rupert D'Cruz (10 Old Square Chambers)

The AGM also reviewed and approved the BRLA accounts for the period 1st January to 31st December 2008 which were presented to the AGM by the Secretary (in the absence of the outgoing Treasurer). All expenses for last year's events were met by the relevant sponsors and a fraction of the membership subscriptions was used to set up the BRLA website leaving a healthy closing balance on the account.

The AGM was followed by a drinks reception and a dinner at which **Valery Popritkin**, *Vice President of Private Banking at Credit Suisse* gave an after dinner speech on "THE EFFECT OF THE CREDIT CRUNCH ON THE RUSSIAN ECONOMY – THE PROGNOSIS FOR

2009 AND BEYOND". Valery's presentation was both informative and engaging and sparked a lively and thoughtful debate about the position of the Russian economy.

➢ *EXTRADITION BETWEEN THE UK AND RUSSIA – 10 March 2009*

Our first seminar of the year was on **"EXTRADITION BETWEEN THE UK AND RUSSIA – An update on current judicial practice"** which was held on 10th March at the Luncheon Room of the Honourable Society of the Inner Temple.

It was organised in association with *The International Committee of the Bar Council* and *Corker Binning Solicitors* who were also the sponsors of the evening.

The seminar was chaired by **Geoffrey Vos QC**. The main speakers were **Peter Binning** and **Robert Brown** of *Corker Binning*.

An overview of the fundamentals of extradition was provided by **Peter Binning** who explained that although extradition retains elements of criminal law, such as arrest, it is a procedure, not a criminal trial. Under the Extradition Act 2003, for an extradition to take place, it is necessary to show that the conditions for extradition are established and there are no bars to an extradition request.

Although there is a general public perception that extradition between the UK and Russia is not possible, the legal framework for extradition between the two countries is in place and extraditable offences in the UK and Russia are similar. The extradition process between the UK and Russia was streamlined following Russia's ratification the Council of Europe Convention on Extradition in 1999. Subsequently, a Memorandum of Understanding between Russian and UK Prosecutors was signed in 2006 which envisaged cooperation between the Prosecutors of the two countries in the sphere of extradition, joint meetings, consultations, discussions, as well as exchange of information on the national legal systems and legislation.

However, the murder of Alexander Litvinenko in 2006 and the stand off between the UK and Russia in relation to the UK's formal request to extradite Andrei Lugovoi to be tried for murder in the UK and Russia's refusal to do so led to a cessation of the cooperation envisaged by the Memorandum 2006.

Peter Binning emphasized that although the legal framework for extradition between the two countries exists, of the 12 extradition requests to the UK which Russia has made since 2000 all but one was refused. The refusals were for the following reasons: (a) the request was considered to have been politically motivated and/or the defendant would be punished on account of his political opinions; (b) it was considered that the defendant's human rights would be violated because of a real risk of torture or other cruel or inhuman treatment (Article 3) or that there would be flagrant denial of justice at trial (Article 6); (c) the request was considered to be an abuse of the process of the UK court. It was pointed out that although they are different concepts, there is an interplay between extradition and asylum cases.

Robert Brown's presentation considered the bars to extradition. He explained each of the possible bars applicable to Russian cases and, in particular, the wide interpretation of political motivation. He pointed out that economic as well as political opinion could fall within the scope of the bar and that the defendant need not be an overtly political figure for it to operate. Robert explained the application of the political motivation bar to extradition requests in the *Yukos* cases and *Zakayev* cases as examples of the application of the human rights bar to extradition.

The presentation was accompanied by slides which you will be able to access shortly on our website and was followed by a panel discussion chaired by **Geoffrey Vos QC**. The panel members included **Professor Alena Ledeneva** (SEES, University College London), **Professor Richard Sakwa** (University of Kent), **Edward Fitzgerald CBE QC** (Doughty Street Chambers), **Rufus D'Cruz** (18 Red Lion Court) and **Robert Brown** and **Peter Binning** of Corker Binning Solicitors.

It was a rare opportunity to hear from people who personally dealt with and fought high profile extradition cases and who have conducted extensive research into the subject and related areas.

The subsequent debate provoked the following questions: Can diplomatic assurances be relied upon; is it possible to police them and is there any remedy if they are breached? Are tax offences extraditable? Was the British government deliberately escalating the conflict in the Lugovoi extradition request by completely ignoring that the Russian Constitution (similar to the constitutions of many other countries) prohibits the extradition of its citizens and that Russia signed the Extradition Convention with a reservation to this effect? Was the British government inconsistent in its approach in treating Russia and its constitutional bar to extradition differently to other countries with a similar regime? These were examples of the questions posed. **Edward Fitzgerald CBE QC** who acted for Ahmad Zakhayev, Boris Berezovsky, Aleksandar Temerko and Natalya Chernysheva in fighting extradition to Russia shared his first-hand knowledge of such extradition cases. **Professor Sakwa** who has recently written a book on Yukos cases analyzed these extradition cases and, in particular, the Lugovoi extradition request. **Professor Ledeneva** brought interesting data relating to Russian extradition requests and spoke about a recent research project "Telephone Justice in Russia" undertaken by her team. **Rufus D'Cruz** pointed out that cycles can exist when it comes scrutinizing the human rights records of certain countries and cited issues relating to Turkey that until quite recently occupied much of the work done by the European Court of Human Rights.

The seminar was followed by a drinks reception at which the participants had an opportunity to talk to the panel members and fellow BRLA members.

The BRLA would like to express its gratitude and appreciation to Corker Binning Solicitors for its help in organising the seminar and for its sponsorship and to the speakers for their contributions. Particular thanks is due to Geoffrey Vos QC, who agreed to chair the meeting at very short notice

➢ *THE INVESTMENT CLIMATE IN RUSSIA FOR UK BUSINESSES – 30 March 2009*

On **30th March** we held a seminar on **"THE INVESTMENT CLIMATE IN RUSSIA FOR UK BUSINESSES – Crisis or Opportunity?"** in association with *Addleshaw Goddard LLP*, followed by a drinks reception sponsored by the firm.

The guest speaker was **Caroline Wilson**, the *Minister Counsellor (Economic and Trade & Investment)* at the UK Embassy in Moscow who was in London in the preparation for the G20 Summit held in London on the 2nd April.

Caroline gave an overview of the current economic climate in Russia in the light of the global recession and outlined how UK businesses in Russia have been affected. She identified the areas of business most affected, the anti-crisis measures implemented by the Russian government and the effect of those measured on UK businesses. Although in the short and medium term the Russian economy will continue to suffer badly the effect of the global financial crisis and decline in foreign investment, Caroline's prognosis for the long term investment opportunities in Russia was positive.

The presentation was followed by a panel discussion involving **Katerina Haslam-Jones** (*Pavda, Haslam–Jones & Partners*), **Jon Tweedale** (*Addleshaw Goddard*) and **Guy Pendell** (*CMS Cameron McKenna*) and Q&A session. The panel shared their views on the investment climate in Russia, difficulties faced by foreign investors and the prognosis for the future. A particular focus of discussion was their respective experiences of enforcing foreign judgments and awards in Russia, including:

- the absence of a definition of "public policy" in the Russian law, which can be a bar to enforcement under article 5 of the New York Convention on the Recognition and Enforcement of the Foreign Arbitral awards.

- the distinction between enforcing judgments/awards relating just to private parties dispute (generally straightforward under the New York Convention) and those involving public organisations backed by the government (which can be problematic).

Guy Pendell shared the results of a survey of Russian corporate finance activity prepared by his firm which revealed that whereas in 2007 M&A deals in Russia were concluded at a rate of almost one a day, with a combined value of c.80 billion Euros, in 2008 the number of deals was down a quarter and the value of those deals halved. However, the research also indicated that confidence was returning and the outlook for future corporate finance activity in Russia was positive.

Guy also highlighted recent changes in the Russian law on limited liability companies which now allows participants in a private company to enter into agreements regulating their rights, including the voting rights (a summary of these changes are included in the last section of this Newsletter).

The seminar was followed by a drinks reception.

The BRLA would like to express its gratitude and appreciation to Addleshaw Goddard for its help in organising the seminar and for its sponsorship of the drinks reception and to the panel members for their contributions. Particular thanks are due to the guest speaker Caroline Wilson, who was able to fit the presentation at the seminar into her very tight schedule.

ACTIVITIES FOR SPRING & SUMMER 2009

Our list of future activities for the Spring and Summer 2009 is as follows:

- ***PROTECTING INTELLECTUAL PROPERTY RIGHTS – 27 April 2009***

On **27 April** we will hold a seminar on **"PROTECTING INTELLECTUAL PROPERTY RIGHTS IN RUSSIA AND THE UK"** in conjunction with *Lewis Silkin* and *Ivanyan & Partners*. Our guest speakers will be: (i) **Professor Alexander Sergeev,** the Head of Civil Law at the Law Faulty of St Petersburg University of Economics and Finance (who is one of Russia's leading experts on Intellectual Property Law); (ii) **Khristofor Ivanyan,** Managing Partner of Ivanyan & Partners, who has substantial practical experience of Intellectual Property issues; and (iii) **Giles Crown,** Partner and Head of Media, Brands and Technology at Lewis Silkin**.**

- ***RUSSIAN ART AND THE LAW – June 2009***

At the beginning of June, in association with *MacDougall Auction House* (a fine art auction house specializing solely in Russian Art) and *Pushkin House* we will be holding a seminar about "**PURCHASING AND EXHIBITING RUSSIAN ART – LEGAL AND COMMERCIAL ISSUES"**. The timing of this event is intended to coincide with the annual Russian Art Week.

Considerable interest was expressed last year about this subject following the near cancellation of the Royal Academy of Arts exhibition "From Russia With Love: French and Russian Master Paintings" after threats by descendants of the original owners Sergey Schukin and Ivan Morozov to submit claims to relevant paintings. The event was only saved after the British government rushed through emergency "immunity from seizure" legislation.

The forthcoming event will explore this issue as well as interesting legal and commercial issues relating to investment in Russian Art. Details will be announced shortly.

- ***SUMMER DRINKS PARTY – July 2009***

In **July** we are planning to hold a summer **SUMMER DRINKS PARTY** to allow our members and guests to meet and talk informally and to provide further networking opportunities.

➢ ***WHAT'S NEXT?***

We will announce our programme for Autumn & Winter 2009 in our next Newsletter. If you have any interesting ideas get in touch!

FROM RUSSIA WITH NEWS

This part of our Newsletter highlights important legal issues and developments in/connected with Russia, including: new laws, interesting cases, cross-border transactions, etc.

- **Limited Liability Companies – new rules**

Significant changes to the regulation of Limited Liability Companies have recently been introduced by **Federal Law № 312-FZ of 30th December 2008** which amended the Federal Law on Limited Liability Companies of 8.02.98 , the relevant provisions of the Russian Civil Code relating to limited liability companies and two other federal laws.

The new regime comes into force on the 1st July 2009 and all limited liability companies will be required to bring their constitutional documents in compliance with the new rules.

Highlights of the new regime are as follows:

- Participants are now allowed to enter into an agreement to regulate their rights, including, in particular, the exercise of the right to vote and the sale of a participation share/interest ("dolya"- «доля») at a defined price.
- The transfer of a participation share/interest will in most cases now need to be notarized and the notary will be required to verify the authority of the transferor and to initiate the registration of the change in the unified state register of legal entities by submitting an application signed by the transferor to the state registration authority accompanied by a transaction document. The notary also must provide the company with copies of these documents.
- Similarly, pledge of a participation share/interest will also require notarization and the notification of the state registration authority and the company by the notary.
- The right of a participant to withdraw from the company is now restricted and made subject to such right being explicitly provided for in the charter.
- The charter is defined as the only constitutional document of the company.
- The company is now required to have a register of the participants, a totally new concept for limited liability companies which until now documented the participations in the charter. However, such register is to be maintained internally by an executive or other body of the company. Therefore, although the new registration regime is similar to that applicable to joint stock companies, it does not appear to allow for the maintenance of the participants register externally.

It remains to be seen how the new provisions will be applied in practice and what implications they will have. However, they are viewed as major changes to 1998 Law on Limited Liability Companies.

- ***Cherney v. Deripaska***

In July last year Clarke J. gave judgment in an application brought by Michael Cherney to serve a claim form on Oleg Deripaska out of the jurisdiction.

The claim relates to an alleged oral agreement reached by the parties in 2001 under which (it is said by Mr Cherney) Mr Deripaska was to hold 20% of Rusal (the second largest producer of aluminium in the world and the largest producer in Russia) on trust for Mr Cherney and to account to him when the shares are sold.

The central question of the application before Clarke J. was whether Mr Cherney had shown that England was the proper place in which to bring the claim, and in particular, whether England was the "natural" forum for the trial, i.e. more appropriate than any other available foreign forum. Clarke J. was not persuaded that the 2001 agreement would be governed by English law and be subject to English jurisdiction and considered that the natural forum for the litigation would ordinarily be Russia as Mr Deripaska is Russian, Mr Cherney is originally from Russia, the dispute concerns the ownership of interests in the Russian aluminium industry and the allegations relate to events which did or did not take part in Russia.

However, Clarke J. nevertheless allowed Mr Cherney's application on the basis that he was satisfied that substantial justice would not be done in Russia in this particular case because of: assassination of Mr Cherney were he to return to Russia; and/or the risk that he would be arrested and prosecuted on trumped up charges if he was to return; and/or the risk that he would not receive a fair trial of his claim in Russia, because of the 'quasi' state interests that were the subject matter of the claim. The judge concluded that these factors made England the proper forum for the trial of the claim.

The evidence given at the trial provided fascinating insights into the world of Russian oligarchs, the "aluminium wars" and the background of both parties. It also involved an interesting examination of the Russian legal system and arbitrazh courts system.

Professor Bowring of Birkbeck College (the BRLA Chairman) gave expert evidence about the risks in the particular case that Mr Cherney would not receive a fair trial if his claim was determined in Russia.

Clarke J. was careful to stress that he was not deciding that a fair trial could not generally be obtained in the Russian arbitrazh system and that his conclusion was based on what he perceived to be a risk of government interference because of the subject matter of the claim.

The decision has been viewed by some commentators as controversial and a departure from the principles of international comity.

Geffrey Vos QC (who chaired our seminar on extradition on 10.03.09) was the leading counsel for Mr Cherney. The full judgment can be found on BAILII web site:
http://www.bailii.org/ew/cases/EWHC/Comm/2008/1530.html

- ***Yugraneft v. Abramovich & Ors***

This was another "Russian" judgment by Clarke J given on 29.10.08 which, in relation to service out of the jurisdiction, he distinguished from *Cherney –v- Deripaska*.

Yugraneft claimed that it was a victim of a massive fraud directed by Mr Abramovich by which its interest in a joint venture company, Sibneft-Yugra, was diluted from 50% to less than 1% as a result of which it suffered a loss of billions of dollars. Yurganeft's parent company, Sibir plc, had previously brought a claim the BVI courts for the loss that it had suffered (as the principal shareholder in Yugraneft) in connection with this dilution.

Yugraneft alleged that certain individuals in the Abramovich camp breached fiduciary duties to Yugraneft by calling meetings and giving notice only to the Abramovich camp and not to anyone in the Yugraneft/Sibir camp and creating new participation rights in the joint venture, which only companies associated with, ultimately owned or controlled by Mr Abramovich benefited from.

Clarke J. dismissed Yugraneft's claim on the basis that: (i) it was governed by Russian law and was time barred under the Russian Civil Code; and (ii) it was an abuse of process in view of the similar claim brought in the BVI by Sibir.

The case involved very interesting debates on matters of Russian law, including: limitation; unfounded enrichment; delict; fiduciary duties of directors and agents; the application of the "abuse of rights" doctrine and ratification; various aspects of Russian civil and criminal procedure law relevant to an English law claim of dishonest assistance, knowing receipt and restitution; and fair trial issues in Russia.

Perhaps the most interesting issue was whether Yugraneft's claim was time barred and the judgment contains an extensive examination of the Russian law on time limitation and how it is to be applied in a claim brought in England.

One of the experts giving evidence in the case was Professor Sergeev of St. Petersburg University of Economics and Finance who provided several reports on the Russian law on limitation in relation to criminal and civil actions and its application to the facts of the case. As mentioned above, Professor Sergeev will be a speaker at our Intellectual Property seminar on 27 April 2009.

Another important aspect of the case was the domicile of Mr Abramovich. The Judge rejected Yugraneft's argument that he was resident in England. He found that Mr Abramovich spent a very limited time in England. In 2007 he spent only 57 full days in the jurisdiction, virtually all in connection with football matches. He did not have any substantial business interest in

England other than Chelsea FC which the Judge held was not a business investment but merely hobby and leisure interest.

Finally, Clarke J. concluded that Mr Abramovich was not a necessary or proper party to a claim against his English registered management company, Millhouse Capital (UK) Ltd and that there was no substantial risk that Yugraneft would not receive a fair trial of it claim if it was to be brought in Russia. He appears to have distinguished this case from *Cherney v Deripaska* on the basis that no state interests were involved.

The BRLA Vice-Chairman and Secretary (Michael Swainston QC and Rupert D'Cruz) acted for Yugraneft and the full judgment can be found on BAILII web site: http://www.bailii.org/ew/cases/EWHC/Comm/2008/2613.html

Newsletter Feedback - Contact details:

For contributions, comments, suggestions, etc. in relation to this Newsletter and its contents, please contact us at editor@thebrla.com

The BRLA would like to thank Victoria Novikova for her work in producing this Newsletter.

Disclaimer:
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