BRITISH RUSSIAN
LAW ASSOCIATION

NEWSLETTER

WINTER 2009

Dear Members and Friends of the BRLA,

INTRODUCTION

Welcome to the Winter 2009 issue of our Newsletter.

2009 has been our most active year yet. During the course of this year we have held 8 events:

- our AGM (in February);
- a seminar on Extradition (in March);
- a seminar on the Investment Climate in Russia for UK Businesses (also in March);
- a seminar on Intellectual Property Rights in Russia and the UK (in April);
- a seminar on Art Law (from a Russian and English perspective) (in June);
- a Summer Drinks Party (in July);
- a seminar on the Rule of Law in Russia (in September); and
- a seminar on Libel Law (again from a Russian and English perspective) (in December).

As a result of our active programme of events our Association continues to grow rapidly. New corporate members who have joined the BRLA recently include: *Gherson & Co*, *Russian Linguistic Services*, *Akin Gump Strauss Hauer & Feld*, *Withers*, *Magisters*, *Blokh solicitors* and *Davis & Co* (for a full list of our corporate members see our website at www.brla.com). A very warm welcome to all of you!

In this Newsletter we review some of our recent events. In *"From Russia with News"* we review two interesting Russian/CIS related court decisions. You are welcome to contribute to this section of the Newsletter in future. Please feel free to send us articles on interesting issues of Russian law and business, cross-border transactions and the like.

Finally by way of introductory greeting, С Новым Годом for 2010!

BRLA EVENTS: APRIL – SEPT 2009, A REVIEW

➢ *PROTECTING INTELLECTUAL PROPERTY RIGHTS IN RUSSIA AND THE UK – 27 April 2009*

This seminar was organised in conjunction with our corporate members ***Lewis Silkin*** and ***Ivanyan & Partners*** who provided guest speakers and sponsored a post-seminar drinks reception. The seminar was held at the offices of *Lewis Silkin* and was chaired by **Professor Bill Bowring**, the Chairman of the BRLA.

The guest speakers were **Professor Alexander Sergeev,** the Head of Civil Law at the Law Faulty of *St Petersburg University of Economics and Finance***, Khristofor Ivanyan,** Managing Partner of *Ivanyan & Partners* and **Giles Crown,** Partner and Head of Media, Brands and Technology at *Lewis Silkin***.**

With the introduction of Part IV of the Civil Code, Russia became the only country in the world where legislation on IP rights is fully codified. Until then, IP rights in Russia were regulated by various laws adopted in the 90-s (the Law on Copyrights and Neighboring Rights, Law on Trademarks, Patent Law and others). As from 1st January 2008 all these laws were repealed and their contents were incorporated in Part IV of the Civil Code.

There were several attempts to codify the IP legislation in Russia and various commissions were created for this purpose. The first two drafts of Part IV of the Civil Code, including the one prepared by the commission headed by Prof. Sergeev, were rejected and the draft which was eventually promulgated into the law was criticized by many experts.

Professor Sergeev is a well known expert on intellectual property ("IP") rights in Russia. He is the author of the leading law text book "The Law of the Intellectual Property in Russia" and a co-author and the editor of the recently published law text book "Civil Law" and the Commentary to the Russian Civil Code. Professor Sergeev chaired one of the commissions engaged in drafting Part IV of the Russian Civil Code which regulates the IP rights in Russia and which came into force on the 1st January 2008. His participation in the seminar therefore provided a unique opportunity to obtain an insight into the process of the codification of IP rights in Russia and to hear about the strengths and weaknesses of the newly codified legislation from someone personally involved in that process.

The Professor gave a critical review of the new legislation. In his opinion, it was a mistake to incorporate all legislation on IP rights in the Civil Code including regulations and rules of administrative nature, such as applications to the Patent Agency, etc. By its nature the Civil Code is a fundamental law and does not envisage frequent changes, whereas intellectual property legislation, particularly in relation to industrial property rights, is a flexible area of law which requires frequent legal updating. This and other problem areas of the new codified legislation were highlighted in the Professor's presentation.

This analysis by **Khristofor Ivanyan** of the new law was followed by a presentation on its practical application in the sphere of trademarks, given**.** Khristofor outlined the changes in the process of registering trademarks and conducting due diligence before acquiring trademarks and identified practical problems that can arise in relation to these matters.

His presentation also included a review of disputes in relation to trademarks and problem areas in the dispute resolution. The courts in Russia are frequently faced with disputes relating to the violation of an exclusive right to use a trademark. Such violations are often penalized by the confiscation and destruction of counterfeit goods. The legality of "grey" ("parallel") imports (when goods are imported into Russia by unauthorized resellers without the authority of the producer and an official dealer) has recently become a particularly topical issue. Very frequently the customs authorities regard such importation as a violation of the exclusive right to use a trademark and respond by confiscating and destroying the goods in question. Such an approach has been widely criticized by Russian lawyers. The decision of the Russian Supreme Commercial Court in the autumn of 2008 to refuse a claim by customs to confiscate and destroy a second-hand car imported into Russia without the authority of the car manufacturer was widely welcomed by the public and the legal community as a victory for common sense. Mr Ivanyan characterized this decision as a move in the right direction which will hopefully be followed by other courts in Russia as a precedent.

Trademark protection in the UK and how that from Russia was the subject of **Giles Crown's** presentation. He identified the categories of trademarks protected in the UK, which include UK registered trademarks, UK unregistered trademarks protected by common law (passing off) and EU registered trademarks, and provided specific case examples. Giles also outlined the trade mark registration procedure, absolute and relative grounds for objecting to registration, trade mark infringement, enforcement in the UK and the advantages of trademark registration in the EU which has become much more popular then originally expected. This was followed by a discussion of practical considerations and differences between trademark protection in the UK/EU and Russia where trademark piracy has historically been prevalent.

The presentations were followed by a question and answer session. The topics raised included: whether it is possible to pledge IP rights in Russia; how Russian courts protect IP rights; whether Russia's application to the WTO has been affected by the gaps in IP rights protection in Russia; how the new Part IV of the Russian Civil Code compares to the legislation in other civil law countries.

An article about seminar was published (in Russian) in Angliya newspaper and can be found in the "Publications" section of our website.

➢ *ART LAW – BUYING, SELLING AND EXHIBITING ART IN RUSSIA AND ENGLAND: A DISCUSSION OF RELEVANT COMMERCIAL AND LEGAL ISSUES - 2 JUNE 2009*

(Images courtesy of MacDougall's Auction House)

Buying, selling and exhibiting art in Russia and England and the associated commercial and legal issues were the subject of the Art Law seminar organised in association with ***Pushkin House*** and ***MacDougall's Auction House*** (an auction house specialising solely in Russian Art). The seminar was held on 2nd June 2009 and coincided with the annual Russian Art Week in London. The venue was the beautiful exhibition hall of MacDougall's Auction House where participants were able to view a wonderful collection of exhibited art works including a rare painting by I. Repin. The seminar was followed by a drinks reception sponsored by **Peter Hambro Mining Plc** and we were pleased to have Mr Peter Hambro as a guest at the seminar.

In the first part of the seminar comprised of presentations by **Ann Dumas**, the Curator of the *Royal Academy of Arts* and **Olga Yadina-Mazure**, a former in-house counsel at the *Hermitage Museum*. The second part was was devoted to a case study based discussion chaired by **Rupert D'Cruz** (Secretary of the BRLA). The case study was presented by **Adrian Parkhouse**, the Head of the Art & Heritage Group of *Farrer & Co* and the guest contributors were **William MacDougall**, Director of *MacDougall Arts Ltd*, **Ludmila Lipskaya**, Art Adviser and Consultant at *Pavda, Haslam-Jones & Partners*, **Ann Dumas** and **Olga Yadina-Mazure**.

Ann Dumas was personally involved in organising the Royal Academy of Arts ("RAA") exhibition "From Russia: French and Russian Master Paintings" which was held at the RAA

between January and April 2008. She provided a fascinating first-hand account of the efforts involved overcoming the difficulties and controversies that surrounded holding it.

The exhibition was widely anticipated and was an historic occasion as it involved the loan of classic masterpieces by French and Russian artists of 1870-1925 by four major Russian museums: the Hermitage, the Pushkin Museum, the State Russian Museum and the State Tretyakov Gallery. It was not clear until the last moment if it proceed because the Russian Ministry of Culture was reluctant to allow the art works to be loaned to the RAA due to the absence in the UK of immunity legislation protecting art works loaned by foreign museums from ownership claims. The possibility existed of such claims being made by descendants of the original owners, Sergey Schukin and Ivan Morozov to paintings that were confiscated after the 1917 Revolution. Only the direct interference by James Purnell, the then Secretary of State for Culture, in the form of emergency "immunity" legislation enabled the event to proceed.

The next presentation was given by **Olga Yadina-Mazure** who provided a detailed review of the Russian and European legal framework in relation to the return of art works confiscated or seized during war conflicts. She paid particular attention to the handling of art treasures seized/confiscated by the Russian Army during the World War II and the relevant legal procedure. In the 1950s add 1960s about 1.5 million art objects were returned by the former USSR to the Dresden Gallery. More recent examples of returned art include stained glass panels to Germany and historical books to Hungary in 2002. Currently the art repatriation process is regulated by the 1998 Federal Law on Cultural Valuables Displaced to the USSR during the course of World War II. However, this law only regulates the return of cultural treasures between states - not between a state and a private individual. At present, the only example of a partially successful claim by a private person against a state is the ongoing claim filed 10 years ago by Martha Nierenberg against Russia in relation to the Herzog collection.

The second part of the seminar involved discussion of issues raised by a case study prepared by **Adrian Parkhouse** based on a hypothetical purchase by a private collector of a painting by a famous Russian artist previously acquired at auction and is delivered to a buyer in Moscow/London. 5 issues arose: (1) title and restitution (in circumstances where it was alleged that the painting was seized by the Nazis and was now claimed by the heirs of the original owner); (2) attribution (where the buyer later discovers that the painting is not by the famous master and that the auction description referred to the painting as being "after the famous master"); (3) export/import of the painting; (4) tax consequences of the purchase; (5) auction payment obligations. Adrian Parkhouse outlined the relevant legal position and approach to the issues in English law and Olga Yadina-Mazure did the same from a Russian law perspective. William MacDougall shared his personal practical experience on attribution, auction payment obligations, export/import implication and tax consequences. Ludmila Lipskaya gave a detailed and practical review of the relevant law and procedures for export and import of acquired art objects to and from Russia and the relevant tax implications.

The case study was followed by question time, after which the participants enjoyed an informal drinks reception and views of the beautiful paintings and icons exhibited at MacDougall's.

➢ *SUMMER DRINKS AND NETWORKING PARTY – 21 JULY 2009*

Our usual SUMMER DRINKS AND NETWORKING PARTY was, one again, held at the offices of *Osborne Clarke* who sponsored the event. It was attended by over 60 members and friends of the BRLA and presented an opportunity for all to meet and talk informally and generally network.

➢ *THE RULE OF LAW IN RUSSIA – THE IMPLICATIONS FOR FOREIGN INVESTORS – 24 SEPTEMBER 2009*

For our second "Rule of Law" seminar since the election of the President Medvedev we had a unique opportunity hear from **Yuri Lubimov**, the *Deputy Minister of Justice of the Russian Federation*. The seminar was organized in association with the *Bar Council International Committee* and was held on 24th September 2009 in the impressive Large Pension Room in Gray's Inn.

The seminar was chaired by **James Dingemans QC**, the Chairman of the *Bar Council Committee* who introduced and welcomed Mr Lubimov and a panel of experts who included **Dr Alena Ledeneva**, reader in Russian Politics and Society, *School of Slavonic and East European Studies, University College London*, **Khristofor Ivanyan** of *Ivanyan & Partners*, **Fraser Cameron**, Director of *EU-Russia Center* and **Rupert D'Cruz**, Secretary of the *BRLA* and *Bar Council International Committee* Representative for Russia.

In his presentation Deputy Minister Lubimov outlined the areas of his responsibility at the Ministry of Justice and the priorities currently on the agenda of the Ministry of Justice for creating a society based on the rule of law. One of the problems highlighted by Mr Lubinov was the need for codification of the numerous (over 300,000) laws and by-laws created over the years in a changing economic and political environment and at federal and regional levels. As examples of progress that had been made, Mr Lubimov mentioned the codification of civil

law which was finalized last year with the final part (Part IV) of the Russian Civil Code (the subject of the BRLA's Intellectual Property Seminar held in April 2009, referred to above) and the introduction of the Tax Code.

Mr Lubimov stated that the top priority of his Ministry is to make the law well known to the public. He mentioned that there is already in place a state program for 'legal enlightment of the population'. This objective involves: (1) making the law more accessible to people and the provision of free legal aid by the state system and by the Bar, notaries, law society, legal clinics at universities, etc. and (2) making the law more transparent for people. An example is the website of the High Commercial Court of the Russian Federation which lists information of all ongoing cases and which allows the public to view court decisions as soon as they are made.

The stability and predictability of the law was another priority identified Mr Lubimov. As an example of progress in this direction Mr Lubimov named the Law On Foreign Investment in Strategic Industries which created for the first tims a clear approval procedure for investments by foreign entities in specific industries replacing a situation when it was not clear who was to make a decision in each case. (This law was the subject of a BRLA seminar in November 2008, held in conjunction with Baker & McKenzie – for details see our Spring Newsletter and the web site).

Mr Lubimov informed the audience that a further priority of the Ministry of Justice is an anti-corruption review of all past acts of the various ministries. There is already a procedure in place to assess if a normative act is corrupt and about 80% of all normative acts are subject to review and assessment.

Another objective is the transfer of some state functions to non-government bodies. A good example is the notary where the state function was quasi-privatised. This led to the "revival" of the profession and its increased popularity.

An important factor of the Rule of Law, according to Mr Lubimov, is effective sanction. The bailiffs agency in Russia has become more active and a new mechanism for effective execution of court decisions has been introduced which includes a database of debtors at the frontier agency which enables debtors to be prevented from leaving the country (as well as other sanctions, including the deprivation of fishing, hunting and other licences).

Mr Lubimov concluded his presentation by emphasising that the Rule of Law is a top priority for President Medvedev. His presentation was followed by contributions and discussion on the subject by members of the Panel of Experts and questions to them and the speaker from the audience.

The proposed radical reform of the Bar mentioned by Mr Lubimov in his presentation (and, apparently, being one of the reasons for his visit to London) generated lots of interest from the audience. According to Mr Lubimov, only 6-8% of the Russian legal market is represented by members of the Bar ("advocates") with the other 82% of legal services being provided by companies, auditors, amateur helpers ("lawyers by heart"). Whereas only advocates have the

right of audience in criminal cases, this does not apply to commercial cases, family law matters, etc. Therefore, according to Mr Lubimov, there is a need for the legal market and advocates profession to be united. He identified two directions of the proposed reform of the Bar as: (1) to control the integrity of the legal market, and (2) to create an elite community of qualified lawyers, similar to the UK model.

Would and how the proposed reform affect the regulation of foreign lawyers practising in Moscow? - was another question posed to Mr Lubimov. He explained that at the moment his Ministry is at a stage of understanding the problems of the Bar and is not yet ready to make any decisions. Therefore it was difficult at this stage to answer that question in relation to the regulation of international law firms in Russia. However, Mr Lubimov emphasised that the objective is to create equal conditions for all participants of the legal market.

The seminar was followed by a drinks reception where the participants were able to continue with their questions to Mr Lubimov in an informal setting.

RECENT & IMPENDING BRLA EVENTS FEATURING IN OUR NEXT NEWSLETTER

- *Seminar on **LIBEL TOURISM: Why Russian Claimants choose English Courts** – 2 December 2009 (London)*
- *Seminar on **CROSS BORDER CO-OPERATION BETWEEN ENGLAND & WALES: interim remedies and enforcing foreign judgments and arbitral awards** – 25 January 2010 (Moscow)*

FROM RUSSIA (& the CIS) WITH NEWS

- ***Cherney v Deripaska*** [2009] EWCA Civ 849; [2009] All ER (D) 02 (Aug)

In July the Court of Appeal handed down its judgment on an appeal by Mr Deripaska of the decision by Clarke J. in *Cherney –v- Deripaska* of July last year (which we reported in our Spring Newsletter).

The appeal was concerned with where the trial of the action should take place and whether the decision of Clarke J. holding that although Russia was a "natural" forum for the trial, it can nonetheless take place in England as a "proper forum" because of the risks inherent in a trial in Russia (assassination, arrest on trumped up charges, and lack of a fair trial).

The Court of Appeal carefully reviewed Clarke J. decision and dismissed Mr Deripaska's appeal.

The Court of Appeal distinguished the "natural forum" as the place with which the case has the closest connection from the "proper forum" as the place where the case can be tried in the interest of all parties and the ends of justice. Therefore the case can be tried in England as the "proper forum", even if it is not the "natural forum", when the interest of justice so requires.

The Court of Appeal held that (1) there was sufficient evidence before the Judge that Mr Cherney was at a greater risk of assassination in Russia and there was a real risk of prosecution on trumped up charges if he returned to Russia, and (2) there was "cogent" evidence of a risk that Mr Cherney would not get a fair trial in the circumstances of this particular case.

The Court of Appeal emphasised that it was not saying that a fair trial cannot be obtained in Russia in all normal cases and that the case under review was not normal and had particular features from which Clarke J. was entitled to reach the conclusion he did.

The full judgment can be found on BAILII web site: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/849.html&query=title+(+cherney+)&method=boolean

- ***Pacific International Sports Club Ltd v. Sports Marketing International & Ors*** [2009] EWHC 1839 (Ch); [2009] All ER (D) 173 (Aug)

Another interesting case where the question of the proper forum - this time England versus Ukraine - was recently considered by the English court, concerned shares in the most celebrated Ukrainian football club Dynamo Kiev. Judgment was handed down by Blackburne J. in July this year.

The claim was brought by Konstantin Grigorishin, a Russian national with substantial business interests in Ukraine, through his Mauritius company Pacific International Sports Clubs Ltd ("Pacific") against Igor Surkis as the main defendant and associated parties. Both Mr Grigorishin and Mr Surkin are prominent figures in Ukraine and are also substantial businessmen. In 1998 Mr Grigorishin entered into various asset-sharing deals with Mr Surkis and his brother which resulted in Pacific acquiring a 20% shareholding in Dynamo Kiev. The shareholding was later reduced to 18% as a result of a gift to President Kuchma, the then President of Ukraine.

Pacific's claim was that due to steps taken by Mr Surkis with others, which involved share transfers, a rights issue and other actions, its shareholding in Dynamo Kiev was diluted from 18% to 1.8% and subsequently was extinguished altogether. The claim was under Ukrainian law for damages for conspiracy to injure, as well as a restitutionary claim for unjust enrichment. The principal question for the Judge to decide was whether the English court had jurisdiction to hear the claim.

None of the defendants, save for Soccer Marketing International Ltd ("SMI"), nor the claimant itself or Mr Grigorishin had any connection with England. SMI was an English company which carried on its business in Ukraine and which at some point held shares in Dynamo Kiev. In 2007 it was dissolved but after the claim was issued SMI was restored to the Register on

Pacific's application for the purpose of the proceedings. All other corporate defendants were BVI companies. Dynamo Kiev was incorporated under the laws of Ukraine and its business was in Ukraine. All events giving raise to Pacific's claims occurred in Ukraine and it was common ground that the claims were governed by Ukrainian law. It was also not disputed that the natural forum for the resolution of the dispute was Ukraine.

SMI was served with the proceedings in England as an English company and Mr Surkis was served on his brief visit to London to watch Dynamo Kiev playing in a Champions League match. The BVI companies were served in BVI on the basis of a permission obtained by Pacific for service out of jurisdiction. Other defendants based in Ukraine have not been served.

The defendants applied for a stay or dismissal of the action on the basis of *forum non conveniens* and other grounds arguing that Ukraine was the proper forum whereas Pacific argued that justice will not be done in Ukraine where it stands no prospect of a fair hearing because the Ukrainian courts are susceptible to political pressure orchestrated by influential individuals such as Mr Surkis and his associates and because of the poor relations Mr Grigorishin has with the current Ukrainian government.

Therefore the principal issue for the Judge was the availability of substantial justice in Ukraine which he found to be "the least straightforward to decide". The Judge considered evidence of corruption, political interference with the administration of justice and judicial impropriety in Ukraine. He pointed out that allegations alone will not suffice and the standard of evidence required was the cogent evidence demonstrating that the appropriate forum (Ukraine) will be unavailable. In this regard Blackburne J. referred to the recent cases of *Cherney –v- Deripaska* and *Yugraneft –v- Abramovich & ors.* (which we reported in our Spring Newsletter) which considered similar allegations relating to the Russian court system and where the same judge (Clarke J.) came in each case to a different conclusion depending on the particular circumstances and facts of the case. Consequently Blackburne J. pointed out that because claimant A cannot obtain a fair trial in a particular country, it does not follow that claimant B will not be able to do so in the same country and that the question is "peculiarly fact-sensitive".

The Judge concluded "not without considerable hesitation" that Pacific has not proved to the required degree of cogency that it will be denied justice in Ukraine. There was evidence that Pacific (Mr Grigorishin) pursued various claims in Ukrainian courts including a successful challenge in a Ukrainian court of an entry to Ukraine ban imposed on Mr Grigorishin. All this left the Judge with a strong impression that Pacific (Mr Grigorishin) was happy to resort to the Ukrainian courts where it suited it (him) to do so.

The conclusion reached by the Judge was also based on additional considerations: the dispute has absolutely no connections at all with England; the dispute involved very difficult issues of Ukrainian law on which the English court would be required to pronounce if the claim is litigated there; practically all participants at trial will be Ukrainian speakers and all documentation was in Ukrainian. As a result, the Judge held that the nature of dispute, the identity of the persons whose evidence was material, the sensitivities involved (control of Ukraine's most celebrated football club) and the very difficult legal issues overwhelmingly pointed to Ukraine as the appropriate forum for the trial.

Therefore despite undoubted problems highlighted by the evidence over the independence of the Ukrainian court system and the problems that Pacific has encountered in pursuing its claims over Dymano shares, the Judge has stayed the English proceedings against SMI and Mr Surkis and set aside permission to serve the BVI defendants out of the jurisdiction.

The full judgment can be found on BAILII web site: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2009/1839.html&query=title+(+pacific+)&method=boolean

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Details of how to join the BRLA can be found on our website: www.thebrla.com

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