

# THE RUSSIAN FEDERATION HIGH COURT OF ARBITRAGE

Letter No. C1-7/CMII-1341 dated 20 December 1999

## On Major Provisions Applied by the European Court of Human Rights to Protect Property Rights and the Right to Justice

The legal basis for the organisation and functioning of the European Court of Human Rights (*hereinafter*, the European Court) is provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (*hereinafter*, the European Convention) and the Protocols thereto subsequently adopted.

At the present time, those international-law instruments are mandatory for the Russian Federation. The Federal Law On Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, passed on 30 March 1998, contains a declaration recognising both the European Court of Human Rights' jurisdiction and its judgments as binding upon the Russian Federation and a statement that Russian citizens shall be entitled to lodge applications with the European Court to protect their rights violated, within six months after having exhausted domestic remedies to protect their rights.

Having acceded to the European Court's jurisdiction, Russian mechanisms of judicial review over the observance of the property rights of economic agents in the Russian Federation received support in the form of international judicial review. This means that the jurisdiction of the courts of arbitration over property disputes and the European Court's jurisdiction to examine complaints about infringements of property rights are inter-connected.

The connection is based on the need to solve a common task of international and domestic judicial proceedings: to protect the property rights of individuals with the proper safeguarding of public order, which follows from Article 6 of the European Convention and Article 1 of the Protocol No. 1 to the Convention (1952).

It should be taken into account, however, that the European Court's overall ideology does not permit arbitrary interferences with the results of the judicial proceedings in the Council of Europe member-States.

National court judgments are only criticised in the European Court's case law in exceptional cases: where they violate fundamental rules of the European Convention and provisions developed by the European Court to protect property rights and the right to justice.

Those provisions are as follows:

### 1. Property Rights are of Private (Civil-Law) Nature<sup>1</sup>

Article 1 of the Protocol No. 1 applies only to those rights and obligations of natural and legal persons that are private in essence and belong to the realm of civil law.

Individuals have the right to peaceful enjoyment of their possessions.

The State should supervise the use of property in order to protect public order, without violating individuals' property rights.

The European Court points out that infringements of property rights may result from unjustified administrative, criminal, or civil-law penalties imposed by government bodies on individuals, or from failure to act by government bodies authorised to supervise the use of property in a given State.

In establishing a private rights violation, the European Court considers the following factors: whether the person requesting protection of property rights actually possesses those rights; whether those property rights have been acquired legitimately; whether the violation is

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<sup>1</sup> See Article 1 of the Protocol No. 1: «Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law».

grave and substantial and what consequences it leads to; whether protection of private rights is not guaranteed by the relevant Council of Europe member-State.

## **2. The Need to Balance Public and Private Interests in Resolving a Property Dispute<sup>1</sup>**

This provision means that in deciding whether to act to protect property rights the European Court assesses how well the domestic court judgment balances the protection of private rights and public interests.

The principle of a fair balance between private and public interests is applied by the European Court to protection of property rights of both individuals and legal entities.

In so doing, an assessment by the European Court focuses not only on the actions of the State bodies (including the courts) (or their failure to act), but also on the performance of their obligations by individuals.

The European Court accepts that in exceptional cases a State may restrict private property rights in the interest of maintenance of public order.

Such restrictions may not be of a fiscal nature.

In most instances, private property rights may only be restricted if appropriate compensation is provided.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

## **3. Access to Court**

Property interests of individuals shall be secured by judicial protection.

Justice may not be denied.

In a number of its judgments, the European Court held that the person concerned should have an opportunity to have his or her case examined by a court – a body of the State established system of justice.

Examination of a dispute shall not be impeded by excessive legal or practical obstacles: complicated or overly formalised procedures for admitting and examining lawsuits; high court fees; unavailability of the legal counsel services; the absence of summary procedures for dealing with simple cases and cases that require prompt protection, etc.

The European Court does agree that in exceptional cases access to court may be restricted for certain individuals: mentally disabled persons undergoing treatment; persons of contentious disposition; consumers whose claims have been joined in one proceeding (*actio popularis*).

## **4. Any Property Dispute Shall Be Resolved by an Independent Tribunal**

A tribunal of law established under authority of the law and competent to examine a given category of property disputes, equally independent of the legislative branch and the executive branch of the government and of the parties to the dispute, and capable of professional assessment of legal facts and adequate construction of the laws and regulations, shall be deemed a court.

For that purpose, the Council of Europe member-State shall guarantee that judges have a term of office of sufficient duration. For their part, judges shall guarantee to the parties that they will observe the statutory judicial procedure of resolving disputes.

A violation of that principle is declared by the European Court pursuant to results of its examination of the composition of the court, the procedure and method used to appoint judges in specific proceedings, the regulation of their terms of office, motions to challenge judges, court rulings on such motions, judges' declarations of recusal, etc.

## **5. Any Dispute Shall Be Resolved by an Impartial Tribunal**

Courts should be impartial in assessing legal facts. Judges of a court as persons who have admitted a dispute for an unbiased examination and have no personal stake in the outcome of the proceedings should enjoy the confidence of the parties to the proceedings and of the society at large.

Judges' impartiality should be clearly visible, apparent and preclusive of any doubts in their lack of bias.

Even where there is the slightest doubt, a judge must declare a recusal. Violations of the impartiality principle are established through assessment of: the efficiency of complaint admissibility procedures; the impartiality of case-assigning procedures in a specific court; whether cases are joined or severed in an arbitrary or unjustified manner, or transferred from one court division to another or from one judge to another, etc.

## **6. Judicial Examination of Any Property Dispute Shall Be Fair**

A judicial examination is deemed fair if the principle of equality of arms of the parties to the dispute is secured.

To make sure the principle is observed, the European Court, in establishing that neither party has any procedural or actual privileges, reviews: if the parties were actually enjoying the adversarial nature of the proceedings; if experts were appointed and expert examinations ordered in an independent and lawful manner; if the techniques used to secure evidence were lawful; if the judgment rendered is well-reasoned; if there are procedures in place and practical opportunities for the parties to appeal against the judgment, and persons not involved in the dispute, whose rights have not been affected by the judgment, are effectively barred from interfering with the appellate procedure; if the parties have actual opportunities to participate in all the stages of the proceedings in the case.

## **7. The Opportunity to Be Heard by Court**

An individual pursuing protection of his or her private rights shall be informed in detail in a language, which he or she understands, about the time and venue of the court hearing; shall have the opportunity to defend his or her rights personally or through his or her representatives and lawyers and be provided with translation/interpretation services; shall be free to present evidence in support of his or her rights, etc.

## **8. Property Disputes Shall Be Examined within a Reasonable Time**

The time of proceedings in a property dispute shall include the time it takes both administrative and judicial authorities of the Council of Europe member-State to examine all the claims submitted by the person defending his or her rights and the actual time it takes to enforce the court judgment.

Whether the time is reasonable, as regards the duration of the court proceedings, shall be established with due regard for the circumstances of the dispute, the complexity of the case, the parties' behaviour in the proceedings, the *bona fide* of the judicial bodies examining the dispute and issuing writs of execution.

However, periods by which the proceedings are by an individual are not included in the time of the court proceedings by the European Court (it examines the motions submitted by a private individual, the reasons why the individual's lawyer was replaced, if applicable, the parties' failure to appear in court without valid reasons, etc.).

Unjustified actions of the State authorities (delaying examination of complaints) and of courts (refusing to admit a lawsuit, replacing judges, staying or suspending proceedings, etc.) are viewed as proof of a violation of the principle that a property dispute shall be examined within a reasonable time.

As a rule, the European Court recognises that a dispute arising from administrative legal relationships takes a much shorter time than proceedings in a civil dispute.

### **9. Proceedings in a Dispute Shall Be Public, and the Judgment Shall Be Pronounced Publicly**

This rule makes it possible to conduct proceedings in the presence of all the persons acting to protect their rights and persons interested in attending the court hearing.

The European Court insists, however, that the facts of a dispute shall be examined only in the presence of the parties to the dispute and of other persons concerned by the outcome of the dispute.

At the same time, the European Court maintains that matters of law may be discussed by a court in the absence of the contesting parties.

The representatives of the mass media and public may be excluded from the trial while examining facts of a case only where the exclusion is reasoned in the interests of morals or due to the legal provisions protecting official secrets.

Notwithstanding the above, the proceedings shall be public at the time when a reasoned judgment is delivered on a property dispute.

The European Court insists that a judgment shall be pronounced publicly and registered with the court's registry to be accessible to all the interested persons. The European Court also encourages public access to court judgments via mass media.

You are hereby requested to take the above provisions into consideration while administering justice in the courts of arbitration of the Russian Federation.

V.F. YAKOVLEV  
President  
the Russian Federation High Court of Arbitrage

*Sources:*  
The Bulletin of the Russian Federation High Court of Arbitrage, No. 2, 2000;  
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