The Interplay of Flexibility and Rigidity in Russian Business Contracting: The Formal and Informal Framework in Contracting

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Rigidity is a typical feature of contract law, since the cornerstone of contract law is that contracts bind the parties to it. Rigid contract law, however, is a challenge for contractual relations, where flexibility is needed. Russian contract law is rigid even compared to many other national contract laws, although the Russian Civil Code was completely re-written to correspond to the needs of a new market economy in the 1990´s. Due to the socialist inheritance, even contracting practices in business are exceptionally rigid. Such a contract culture reflecting strong attitudes of legal centralism leads on the one hand to peculiar ways in circumventing the rigid rules of contract law and neglecting written contract documents in favor of flexible practices on the other.

The article approaches contacts from two different standpoints. Firstly we study how flexibility is introduced in the rigid and formal contract law in the Russian Civil Code and court practice. Secondly we study Russian contract culture through interviews of businesspeople. We analyze our findings through several economic and sociological theories in a multidisciplinary way. The approach to understanding contracts is proactive law regarding contract as a tool in business promoting business goals rather than a legal device.

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1. Introduction

1.1. Legal centralist law, multiplicity of norms and contracting cultures

Contemporary business functions in a global world in an environment of constant changes. Therefore especially long-term business cooperation requires flexibility in contracting. Contract law, however, was created for more stable circumstances and for ordinary sales transactions, in which keeping promises is the main goal, not adjusting to constant changes in the environment. *Pacta sunt servanda* is the strong cornerstone of contract law. Connected with freedom of contract, the wide private autonomy of contract law is supposed to protect the parties, who rely on the binding effect of contracts in their original form.

Classical Continental contract doctrine sees contract as a consent formed through expressions of the free will of the parties.[5] Freedom of contract, which is based on the free will of the parties, allows contracting parties to draft more flexible contracts if they wish to do so. In principle the rigid nature of contract law may even encourage either to introduce flexibility in contract documents or to nourish it in contractual relations.

Lawyers often ignore the fact that contracts are not written for courts and lawyers to interpret the will of the parties. They tend to pay attention only to the legal dimension of contracts and from that standpoint defend the classical interpretation of *pacta sunt servanda*. A court-centered approach, which is anchored to legislation, court cases and legal doctrines and which forgets that contracts are made for business cooperation and that disputes are more often solved outside courtrooms with other than strictly legal rules, is called legal centralism.[6] Lawyers tend to focus only on legally binding rules, which are protected by courts, and ignore all other sets of norms and rules as non-binding. Lawyers generally represent legal centralism, while businesses may have to respect business practices, which may bind them even more effectively than legally binding rules. Even if breaking such rules might not be

[5] E.g.: Popondopulo, Vladimir F. (1987) Ob´´ektyvnye granitsi, pravovye formy i kriterii klassifikatsii obezatelstv. Problemy grazhdanskogo prava. Leningrad; Larenz, Karl (1989) Allgemeiner Teil des deutschen Bürgerliches Rechts. Ein Lehrbuch 7, 515. Aufl. Verlag C.H. Beck. München; Hemmo, Mika (2006) Sopimusoikeuden oppikirja. Talentum, Helsinki, 31.

[6] See: Galanter, Marc (1981) Justice in Many Rooms. Courts, private ordering and indigenous law. Legal Pluralism 19 (1981), 1-47; Nysten-Haarala, Soili (1998) The Long-term Contract. – Contract law and contracting. Finnish Lawyers Publishing, Helsinki.

sanctioned in courts, loosing reputation in business may be a more effective sanction. Legal sociologists and anthropologists pay attention to the multiplicity of different sets of rules, which seems to increase in global business. Businesses have to cope with global, national and local rules, which may contradict each other.[7]

The plurality or multiplicity of norms has also been recognized in legal studies. Private international law has always dealt with the conflict of laws, which traditionally focuses on which country's law is applied in international legal problems between companies or individuals. Nowadays there is also a discussion on *lex mercatoria* or New Merchant Law, focusing on the need to accept international principles and rules (UNIDROIT Principles, Principles of European Contract Law (PECL) and alike) as sources of law in court decisions.[8] The circle of international commercial lawyers already applies such sets of rules in private arbitral tribunals. It can be claimed that international business contract law resembles an international legal system, while national contract laws are only variations of it. Even this international contract law reflects legal centralism, but with a universal approach. It emphasizes similar features in national laws and promotes unification or harmonization of contract law.[9]

The principle of freedom of contract promotes the multi-regulatory environment of international business. National contract law, such as the Russian Civil Code is mostly non-mandatory; such default rules are applied only if not otherwise agreed in the contract. Although there is also a growing tendency towards an increase of mandatory norms, which protect either consumers or competition on the market, businesses have alternatives in choosing the law and regulations, which are applied to their contracts.

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[7] Cf. the discussion on global legal pluralism e.g. Teubner, G. (1992) The Two Faces of Janus: Rethinking Legal pluralism. Cardozo Law Review 13, 1443-1451; Teubner, Gunther (1997) Global Bukowina: legal pluralism in the world society. In Teubner (ed.) Global Law without a State. Dartmouth Aldershot, 3-28; Michaels, Ralf (2005) The Re-State-ment of Non-State Law: the State, Choice of Law, and the Challenge from Global Legal Pluralism. Duke Law School Legal Studies Research paper Series, No 81 (September 2005). Available at http://ssrn.com/abstract=809244 (accessed 26 August 2014); Berman, Paul Schiff (2005) From International Law to Law and Globalization. Columbia Journal of Transnational Law Vol. 43(2), (2005) 485-556.

[8] See e.g. Berger, Klaus Peter (2010) The Creeping Codification of the New Lex Mercatoria. Kluwer Law International; Von Bar, Christian and Mankowski Peter (2003) Internationales Privatrecht. Band 1. Allgemeine Lehren. 2 edition. Beck München.

[9] See e.g. Lando, Ole (2007), Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law? European Review of Private Law, Vol. 15(6), 1687-1725; Berger, Klaus Peter (2010) The Creeping Codification of the New Lex Mercatoria. Kluwer Law International.

Contract culture, however, is more difficult to avoid than the provisions of contract law. Every industry or commercial branch has its own standards, which sometimes can be commercial usages or trade customs. Even they can be set aside agreeing otherwise in the contract. Multinational corporations often tend to introduce their own contracting practices to their business partners with their own contract templates. The rise of American contracting practices with long and detailed contract documents is proof of such a worldwide phenomenon.[10] In spite of such development of a more technical and formal nature, informal contracting practices such as thinking modes and working habits may be more difficult to avoid or set aside in practice, since they are cultural and unconscious.

Douglass North's institutional economics gives a good explanation for the difficulties encountered even by huge influential multinationals in tackling with local habits and thinking modes. They are informal rules of the game, while laws and formal contracts are formal rules of the game or formal institutions.[11] Formal institutions were in Russia changed very quickly simply by drafting a new Civil Code with new values of a new market economy. Change in the formal rules of the game does not, however, change the informal rules such as habits in contracting and ways of approaching contracts and contractual liabilities. These habits may carry unconscious cultural values from earlier times. Since Russia is a country with strong informal institutions and weak formal institutions,[12] unconscious informal rules of the game are important also in contracting.

Sociologists and anthropologists have paid attention to latent and not articulated communication and other cultural dimensions of contracting.[13] Edward T. Hall suggested distinguishing low-context and high-context cultures. In high-context cultures many things

[10] Professor Giuditta Cordero Moss's research group at the University of Oslo has studied this phenomenon especially from the point of view of contract clauses (see http://folk.uio.no/giudittm/AngloAmerican%20Contract%20Models.pdf).

[11] North, Douglass C. (1990) Institutions, Institutional change and economic performance: A new Economic History. Cambridge University Press;
North, Douglass C. (2005) Understanding the process of institutional Change. Princeton University press. Princeton, New Jersey.

[12] Rose, Richard (2000) Getting Things done in an Anti-modern Society: Social Capital Networks in Russia in Dasgupta P. and Seragelden I. (eds.) Social Capital. Washington D.C. World Bank, 147-171.

[13] Hofstede, Geert (1983) Culture's Consequences: International Differences in Work-Related Values. Administrative Science Quarterly, December 28 (4), 625-629;
Garfinkel, Harold (1967) Studies in Ethnomethodology. Prentice Hall, Inc, Englewood Cliffs New Jersey; Geertz, Clifford (1973) The interpretation of cultures: Selected essays. New York: Basic Books.

are left unsaid and require cultural context to illuminate the meaning. North America and Western Europe are regarded as low-context cultures, which value logic, facts and directness, while high context cultures in Asia, Middle East, Africa and South America are relational, collectivist, intuitive and contemplative emphasizing interpersonal relationships.[14] In more recent research based on fieldwork, John Hooker divides cultures as rule-based or relationship-based and thus assumes a continuum between different cultures that result from multiple combinations of features of both types of cultures.[15] Even the most typical examples of rule based cultures also have a relational dimension of contracting as Macaulay (1963, 1985) and Macneil (1974, 1978) have shown.[16] Cultural or business cultural dimensions can be important especially from the informal and relational point of view and can reflect on the reputation of companies even without legal sanctions.

Contracting can and should in practice be approached from many different standpoints. There are;

1) more or less global rules of the game of the industry;
2) organizational culture and rules;
3) more general cultural rules of the area; as well as
4) national, international or even local formal rules and regulations.

They all frame contracting and contract documents.

1.2. Approach and Method

The typical understanding of contracts as legal documents, which should be left for lawyers and hidden in a safe box, is an example of informal institutions, which have developed during

[14] Hall, Edward T. (1976) Beyond culture. Garden City, NY: Doubleday.
[15] Hooker, John (2012) Cultural differences in Business Communication. In Paulston, C. B., S.F. Kiesling and E.S. Rangel (eds.) Handbook of Intercultural Discourse and Communication. Wiley.
[16] Macaulay, Stewart (1963) Non-contractual relations in business: a preliminary study. American Sociological Review, Vol. 28, 55-67; Macneil, Ian (1978) Contracts: Adjustment of long-term economic relations under classical, neoclassical and relational contract law. Northwestern University Law Review, Vol. 72, No 6 (Jan-Feb 1978), 854-905; Macaulay, Stewart (1985), An Empirical View of Contract. Wisconsin Law Review 1985, 465-482. Macneil, Ian (1974), The Many Futures of Contract, 47 Southern California Law Review p. 691-816.

a long period of time in business. It shows how strong the influence of legal centralism is, since it has managed to colonize contract documents on behalf of lawyer-master taken out of the hands of the real users of contract. The wider perspective, which we apply in our study, represents proactive law paying attention to improving business contracting in order to better serve business purposes and avoid unnecessary disputes, especially disputes, which are taken to courts.[17]

Contracting in proactive law is seen as organizational capabilities, which can be improved.[18] Nysten-Haarala and her research project detected three intertwining dimensions of contracting capabilities, namely content, process and relational. Content capabilities are directed to planning and choosing the content for contract documents. Content capability is not just a legal skill to draft and choose contract clauses, but a wider capability in understanding the environment of contracting and the multiplicity of norms around the contract and affecting the contents. Process capability refers to organizational processes and technical contract management in an organization. Relational capabilities are negotiation and communication skills, which are important from the point of view of informal rules of the game (CCC report 2008).

The more precise objective of our research is to find out how flexibility is introduced in contracts in an environment of rigid contract law and rigid formal practices of drafting contract documents. First, however, we present the framework of formal and informal rules of contracting. The formal rules are the national Civil Code of the Russian federation[19] compared with the Convention on the International Sale of Goods (CISG) which in Russia is

[17] Siedel, George. J. & Haapio, Helena (2011) Proactive law for Managers: a hidden source of competitive advantage. Gower Publishing Company; Haapio, Helena (2006) Introduction to Proactive Law from a Business Lawyer's Point of View. In Peter Wahlgren (ed.) Scandinavian Studies in Law. A Proactive Approach. Stockholm Institute for Scandinavian Law, Vol. 49. Stockholm, 21-34.

[18] Cf. Argyres, N. & Mayer, K.J. (2007) Contract design as a firm capability: An integration of learning and transaction cost perspectives. Academy of Management Review, Vol. 32, No 4 (Oct 2007), 1060-1077; Teece, D.J. (2007) Explicating Dynamic Capabilities: The Nature of Microfoundations of (Sustainable) Enterprise Performance. Strategic Management Journal, 28 (13), 1391-1350.

[19] The first part of the CC covering the general rules of the law of obligations came into force in 1994, the second part covering regulations of specific types of contract in 1996.

applied to contracts of international sale of goods[20]. The Civil Code applies to domestic sale of goods or services and also fills the gaps of the CISG as secondary legislation.

In the second part of the study we advance to the application of formal rules and their interplay with informal rules through semi-structured qualitative interviews. Interviews were conducted in St. Petersburg in 2012 and 2013 in one German-Swedish company working in transportation, one Finnish company working in services and an American company working as a franchising chain in technology industry. The companies represent large and medium sized business, which have a history of working in Russia for at least three years. The names and concrete activities of these companies are obscured to protect their interests and standing in the market.

The case studies included interviews with managers and lawyers of the companies, a study of the history of the companies' operations in Russia, and an analysis of significant documents such as corporate codes of ethics; plus disputes in courts with these companies as a defendant or a claimant (2011-2012). Experts and informants were encouraged to answer freely without any standard options of answers. The free interview form allowed researchers to receive answers that reflected the interviewees' own cognitive and mental constructions, in this case providing insights into how economic actors understand the problems of international cooperation and ways of solving them.

We also interviewed a Finnish consultant, who operates in Russian markets advising Finnish companies. In the analysis we also refer to earlier interview studies of Finnish companies importing wood from Russia and their Russian partners. These interviews were also semi-structured and were conducted in 2004 – 2005 in Finland, St. Petersburg, Petrozavodsk and Arkhangelsk. They have been reported in an article "Contract Law and Everyday Contracting" published in 2006. Although the companies of this earlier interview study represent a different business branch and only trade with Finnish partners, they indicate how contracting practices have developed or not developed during the timeframe of the last ten years.

[20] The CISG is already some kind of a world-wide law in international sale of goods. It has been ratified in 78 countries and can be applied even when there are parties from countries, which have not ratified the convention (CISG, Article 1).

Besides our own interviews, we also refer to the rare empirical studies, which other researchers have made in Russia and reported in literature.[21] Based on both our own interviews and findings of this other empirical research, we also study the role of corporate lawyers in business as well as the role of courts in Russian business.

2. The formal legal framework of contracting

2.1. The origins of Russian civil law and tight control

In the legal family classification of comparative law, Russian law belongs to the family of continental civil law systems. German BGB was the example for the first Soviet Civil Code in 1922 as well as for the Civil Code of 1964. The concepts and the style of codifying law originate from Germany, although the main institutions of civil law, such as private property and freedom of contract became less significant in soviet civil law. Property rights were weak even before socialism, the long tradition of which still obscures the Russian economy. Contract law in the socialist planned economy became administrative by nature, since contracts were made based on the state economic plans and functioned to fulfill these plans. Contracting parties could not freely draft contractual clauses, but were tied to instructions from above. Yet, in our opinion Zweigert and Kötz are right in understanding that socialist law was never as socialistic and as different as the Marxist scholars made it seem.[22]

Planned economy was an attempt to abolish the markets, but it actually prompted a parallel shadow economy to fill in the gaps of the official planned system. The official economy answered with tighter control, which the shadow economy again circumvented.[23] Red tape and arbitrary control of authorities were typical features of Russian administration already before the revolution.[24] Weak formal institutions allowed red tape and arbitrary control to continue and accordingly become an essential part of the society's structures, which informal rules of the game then support. This indicates that modernization has not been completed in

[21] e.g. Murrell, Peter (ed.) Assessing Value of Law in Transition Economies. Ann Arbor. The University of Michigan Press 2001.
[22] Zweigert, Konrad and Hein Kötz (1998) Introduction to Comparative Law. Translated by Tony Weir. 3 edition. Oxford University Press.
[23] Hosking, Geoffrey S. (1985) A History of the Soviet Union. Fontana Press.
[24] This can be detected from e.g. Nikolai Gogol's novels and short stories, which are written with a satirical style, but are clearly based on real life phenomena.

Russia and the level of the Weberian formal rationality not been reached in economic administration.

When the Soviet Union collapsed, civil law and its historical roots did not disappear. The new Civil Code of the Russian Federation was drafted by lawyers, who represent the Soviet tradition.[25] The concepts and doctrines are of German origin and are still based on will theory, juristic act, subjective rights and the like.[26] The drafters actively searched models for law for a new Russian market economy from European and American, both civil law and common law legal systems. Transplants from Western market economy systems were adopted, but nobody was truly able to anticipate how a new market economy would work in practice. Drafting of new laws was strongly lawyer-driven, and lawyers in all legal systems are typically unaware of economic and social dimensions of society operating only under legal concepts.[27]

Traditional ideas of the need for tight state control can be found in a many requirements of formal procedures, which are considered as safeguards for actors in the market. One typical safeguard is the requirement of a written form of contracts. According to the Civil Code of 1994, oral contracts were valid only between citizens and with the value less than 10 minimum wages[28] and most contracts required notarial proof or registration (Articles 158-165 GK). After the recent reform of the Civil Code which entered into force from September 1, 2013 (FZ 07.05.2013 N 100-FZ) the minimum value for oral contracts rose up till 10. 000 rubles except for contracts, which based on legislation require a written form. The requirement for registration was limited only to transfer of ownership of immovable

[25] Members of the group preparing for the Civil Code, which Braginsky's and Virtyanski's commentary book (1999) mention, such as A.L. Makovskij, G.E. Avilov, S.S, Alekseev, G.D. Golubov, V.A. Dozortsev, Ju. H. Kalmykov, O,M,. Kozyr', E. A. Suhanov and S.A, Hohlov were influential legal scholars already in the Soviet Union.

[26] The above mentioned commentary book also mentions by name several prominent soviet legal scholars, whose works in the opinion of Braginski and Vitryanski could have been published in any other country, including non-socialist countries. This opinion shows how strong the influence of the German legal doctrine and law scholars' internationally narrow approach to law as the system of legal rules was and still is.

[27] See *supra* 25

[28] A minimum wage as a calculative measure is only 100 rubles. The maximum value of an oral contract was earlier about 22 euros or 30 US $. (5.9.2013) and now rose up till 2.200 euros or 3.000 US $.

property.[29] Although formal requirement have been diminished, there still are many requirements for permissions thus allowing strong control of the authorities.

2.2. Commercial usages

The Civil Code commentary of Vitryansky and Braginski clearly indicates that the lawyers who were preparing the Civil Code were consciously making the rules of the game for business, not just enabling a framework for business. One clear indication of this legal centralist mentality is that commercial usages cannot be applied if they are not stipulated in legislation (Article 5.1. GK). In principle this did not mean that a commercial usage had to be clearly mentioned in the Civil Code, but that it could somehow have been interpreted as corresponding to legislation. In practice, compared with the CISG this requirement gave commercial usages a lower position in the hierarchy of legal sources which can be interpreted by courts.[30] This regulation clearly differs from international contract law, where "commercial usages, which the parties knew or ought to have known and which are widely known and regularly observed in the particular trade concerned, can be impliedly applied to the contract" (CISG art 8). Besides an extreme legal centralist attitude, this difference in Russian domestic contract law may also have reflected a suspicious attitude towards commercial practices in domestic business, which either originated from administrative practices of the soviet economy or from the earlier criminal shadow economy.[31] These early business practices were not regarded among lawyers as being fair, therefore a measure test with the Civil Code seemed a logical idea in order to sweep out undesired practices.

In the recent change of the Civil Code[32] this stipulation was clarified to refer only to business practices, which are not established commercial usages. Such practices even if they are widely spread in business or adopted in contracts are not legal in case they contradict with

[29] The concept of immovable property is rather wide in Russian law; including land property and buildings even on state owned land. Even vessels (ships, aircrafts and space related vessels) are immovable property (CC article 130)

[30] Braginskij, M. I and Vitryanskij V. V. (1999) Dogovornoe pravo. Kniga pervaya. Obshsie polozheniya. Moskva: Statut, (p. 72-71).

[31] The supremacy of trade usages may also be a threat to business. According to Lisa Bernstein's recent research courts tend to accept almost any practice as a trade usage with very weak proof. (see. Berstein (forthcoming in 2014)).

[32] (07.05.2013 N 100 –FZ).

norms of behavior, which are presupposed by legislation. Business practices can be regarded as illegal, but this regulation is actually targeted only towards wild practices, which contradict mandatory legislation.

2.3. Standard contracts

The attitude of civil law to standard contracts is also influenced by the Soviet past. In the planned economy there were many standard templates, which were introduced through legislation and/or used by state enterprises. Present Civil Code recognizes such contracts as model contracts (*tipovye dogovory* art 426) required by law and issued by the Government of the RF or federal organs authorized by the Government. These templates are used in situations where the public entity having a monopolistic position in the market is forced to make a contract, because the other party has no alternative partners for concluding the contact with. Such templates are also in use under the Consumer Protection Act. Nowadays, the amount of such contracts has, however, diminished considerably.

The Civil Code also regulates so called General Model Conditions (*primernye usloviya* art 427). The only requirement under the Civil Code for these general conditions is that they should be published in press. Any commercial company can develop a model contract, publish it in press and in this way prove that the model is publicly known. Such model contracts can be referred to in a contract in order to make them a part of the contract. According to the Civil Code such standard contracts can also have a status of commercial usages. The text book of Braginsky and Vitryansky identified an abundance of all kinds of published models. Book stores are full of collections of templates, which are often quite plain and cover only provisions, which are required by default rules of the civil code. The civil law commentary points out that these collections of templates have a different function than model contracts, which are based on legislation, confirmed by the government and issued by a ministry or a corresponding authority.[33] Many published templates can, however, be used as some kind of checklists in order to control that the provisions required by legislation are included in the document.

[33] Braginskij, M. I and Vitryanskij V. V. (1999) Dogovornoe pravo. Kniga pervaya. Obshsie polozheniya. Moskva: Statut, (p. 79).

The Civil Code regulates in article 428 (*dogovor prisoegineniya*) how standard contracts become binding between contracting parties. This article regulates contracts in which one party is in "a take it or leave situation" such as consumers in concluding insurance contracts, contracts with banks or e.g. a lease contract in St. Petersburg. The Civil Code gives an opportunity to ask the court to terminate such a contract even if it does not contradict any legislation but only diminishes his rights in an unfair way compared to the contents of default rules. The unfair conditions of the contract have to be such that the consumer would not without the "take it or leave it"-situation have accepted them. The above mentioned regulation does not, however, protect parties to a B2B contract.

Standard contracts recommended by industrial organizations, such as ORGALIME or NL contracts, which are widely used in Europe, are not yet well known in Russia. International trade has, however, brought these standard contracts to Russia, as well, because international contracting parties may suggest them to be used. Limitations of seller's liabilities, which are characteristic to these standard contracts, may be confusing for Russian contracting parties and even lawyers, but there is no legal obstacle in using them in B2B relations.

2.4. Interpretation of Contracts

The Civil Code, which is officially proclaiming freedom of contract (Article 421) on the one hand, wants to control business on the other. Even rules of interpreting contracts differ in Russian domestic contract law (Article 421) from international contract law – in the form of the CISG (Article 8), which is applied to contracts of international sales even in Russia. In the CISG:

> "the starting point of interpretation is the intent of the parties, or if that is not possible to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." These are interpreted through "all the circumstances of the case, including the negotiations, any practices, which the parties have established between themselves, usages and any subsequent conduct of the parties."

In more formal Russian law, the written text of the contract document is the starting point, which can then be complemented with other material such as negotiations, other oral

expressions, commercial usages and established practices of the parties. If the written contract is unclear, other conditions and the aim and spirit of the contract as an entirety will contribute to the interpretation (Article 431 GK). Written expressions are emphasized because of their value of proof in courts. The entirety of contract is certainly more difficult to prove in Russian courts, which do not prefer oral proof to a written document.

2.5. Requirement of a Written Form of Contracts

The recent change of the civil code abolishing the earlier requirement of the written form from international sales contracts is quite radical.[34] Soviet Union was one of the countries, which required a reservation to the CISG making written form of contract obligatory for contracts with one of the parties from a country, which joined the reservation (Article 96 of the CISG). Now Russia has abandoned the reservation and from September 1, 2013 even oral contracts are valid in international trade. On the one hand, this change takes Russia closer to the CISG community in international trade, but on the other widens the difference between domestic and international contacts. The warnings of Russian text books from applying domestic rules to international contracts and their emphasis on the many differences in interpretation of international sales contracts compared to domestic contracts, are still valid.[35]

Written contracts are still recommenced in international trade, because they are a handy proof of the content of the contract in courts. On the other hand state authorities control contracts, which for this purpose need to be in a written form. The difference which the change in law makes is that written contracts do not necessarily have to be changed with every price reduction or other minor change. The authorities cannot claim that the changes are invalid, if they are not made in a written form. Proving the new content of a contract, which exists in an oral form, may, however, be demanding. Thus, price reductions and other similar changes are still recommended to be made in a written form.

The customs office controls contracts of import and export. The amount of goods mentioned in the document has to correspond with the real amount. The banks have to control that the

[34] (07.05.2013 N 100 –FZ)
[35] Rozenberg, Mikhail .G. (2003) Mezhdunarodnaya kuplya-prodazha tovarov. Kommentarii k pravomy regulirovaniyu i praktike razresheniya sporov. Moskva: Statut, (p. 31).

payments correspond to the contract price. Tax authorities can arrange a raid to the premises and check all the contracts. In such circumstances formal contracts are written for the state authorities not for the parties themselves. Contract documents cannot be devices of communication between contracting parties, as proactive law suggests, because they serve for other purposes.[36] A contract document is more like an official façade for a contractual relationship rather than a document reflecting the real relationship. A formal contract is not written only as the potential safeguard of the court as in the Western countries, but to satisfy all the authorities, who require that the formal rules of the game be followed.

Sale of goods contracts can avoid Russian contract law provisions almost totally. The CISG governs international contracts, although it can also be excluded and other national laws chosen instead (Article 6 of the CISG). Yet, the CISG does not apply to services (Article 3)[37] or all goods (Article 2), furthermore it does not apply to all the problems. The CISG does not cover invalidity of contracts, authorization, or property rights (Article 4). These have to be covered by secondary legislation which if not otherwise agreed depends upon the rules of private international law. According to those rules, the secondary legislation can be Russian law or the law of the other party of the contract. The secondary legislation can also be agreed in the contract, as well as the site of dispute resolution be moved out of Russia. Domestic contracts with parties, whose places of business are in Russia, are covered by the Russian Civil Code. A foreign owned company which is registered in Russia is a domestic company.

2.6. Rules of Invalidity of Contract

Invalidity of contracts is an interesting aspect of Russian civil law (Articles 166-181 GK). According to the Civil Code a contract can be invalidated based on formal mistakes, mandatory legislation, lack of authority and flaws in the formation of will such as fraud, physical or psychological duress and error irrespective of motive. An error can be found also in not understanding the aim of the contract. Furthermore a fake contract or a contract

[36] Nysten-Haarala, Soili (2006) Contract Law and Everyday Contracting. In Peter Wahlgren (ed.) Scandinavian Studies in Law. A Proactive Approach. Stockholm Institute for Scandinavian Law, Vol. 49. Stockholm, 263-283.

[37] Actually the CISG can in some circumstances be applied also to services if they are additional to a sales contract. Interpretation of article 3 of the CISG is, however, quite unclear.

established against legal principles and ethics can be invalidated. The latter rules certainly give a lot of room for interpretation.

The Russian Civil Code also includes a very peculiar reason for invalidity, which is that the contract has been concluded against the aims of the company declared in the company's founding documents (Article 173 GK). Earlier anyone could ask for invalidating a contract based on this rule, and often state authorities interfered in contracts based on this rule. After the changes of 2013 only the organization itself, its founder or someone in the organization can ask for invalidating the contract based on it contradicting the aims of the company if it can be proven that the other party knew or ought to have known that the contract was contrary to the aims and purposes of the company.

In principle invalidity is in all legal systems a grave exception, which leads the contract being interpreted as never having existed. In Russia, however, the courts have often interpreted invalidity quite broadly, especially when the authorities are involved. Therefore invalidating contracts has become a tool in getting rid of unprofitable or otherwise bad contracts as well as a tool for authorities' arbitrary interference. Since formal requirements, such as notarial certificates or various licenses are many, and interpretation of other grounds for invalidating a contract wide, it is easy to find or even deliberately leave an option in the document for later invalidating the contract in case everything does not work as it was planned. Companies, who change their minds and do not want to cooperate any more, have been able to find loopholes in for instance defining the essential terms of contracts, and manage to get the contract declared invalid in court. Rigid rules start to work in a contradictory manner, when they are used for circumventing the otherwise binding contract.

The recent reform of the Civil Code tries to limit the possibilities for using rules of invalidity in bad faith, excluding it from a party who was not in good faith, especially if his behavior leads the other party rely on the validity of contract. It remains to be seen, how often absence of good faith and deliberate causing of invalidity can be proven in courts. By law protected threatened interests of a third party, can also lead to invalidating a contract. Even after the reform, the authorities were left with opportunities in interfering contracts. The Civil Code stipulates that if public interests or other interests protected by law are threatened, the court can from its own initiative declare the contract invalid. In other cases only the parties to the contract can claim for invalidity.

Invalid contract were earlier null and void as such, while now the civil code applies the term "disputed" (*osparimaemyi*) making validity of such contracts dependent on the parties. If the contracting parties do not claim for invalidity, the contract stays in force.

In the data collected about the three case study companies, we found several legal disputes in *arbitrazh* courts (during 2011-2012).[38] Most of the cases, which we found in the Russian database of *arbitrazh* courts concerned foreign owned companies claiming for a payment from their Russian clients. In almost all of those cases the Russian defendant claimed that the contract is invalid. Even if in none of those cases such counterclaims were accepted, claiming for invalidity indicates that it is an ordinary tool in a litigating lawyer's toolbox and may sometimes work. The new amendments of the Civil Code should close some of these loopholes and decrease the amount of artificial and unjustified invalidity claims.

This is not the only case in which loopholes are identified and then mended. Law in Russia is often misused creatively for purposes that it was not meant for. The misuse of minority shareholders' rights and bankruptcy legislation in hostile takeovers is one such phenomenon[39] and introducing corruption with the help of anti-corruption rules is another.[40] The legislator can never know in advance, which legislation is going to be misused and how to close the loopholes for good. New loopholes will definitely be discovered as soon as the old ones are mended. This kind of flexibility is harmful for the whole credibility of the legal system, which cannot protect business from misuse of law. Unfortunately, the tendency to circumvent law also affects on the wording of legal text and makes it excessively complicated.

2.7. Changed Circumstances and Early Termination of Contract

Flexibility in law is often connected with the regulations concerning changing circumstances. The original model for drafting changed circumstances has for civil law countries, which follow the German tradition, been the BGB 242 general clause of good faith (*Treu und*

[38] *Arbitraz*h courts (*arbitrazhnyisud*) are not private arbitral tribunals in Russia, but state courts for commercial and business related disputes. Private arbitration is called *treteyskiy sud* in Russian. Arbitrazh courts and ordinary courts are now being merged in Russia to a unified court system.
[39] Matilainen, Anna-Maija (2009) The Struggle for the Ownership of Pulp and Paper Mills. In Nysten-Haarala, S. (ed.) Changing Governance of Renewable Natural Resoruces in Northwest Russia. Ashgate. Farnham, 105-128.
[40] Tulaeva, S. (2011) How anti-corruption laws work in Russia. Russian Analytical Digest 92.

Glauben). More recent civil codes of European countries as well as international principles of contract law have paid attention to regulating the effect of changed circumstances in contracts. The Russian Drafting Committee of the Civil Code seems to have looked at the UNIDROIT (Articles 6.2.1. – 6.2.3.) principles in developing exception rules of the article 450 of the Civil Code. Traditionally changing circumstances can lead to termination of contract in very rare cases, since it is required that changes in circumstances are mostly foreseeable and assumed that contingencies can be anticipated with contracts. The main rule in article 450 reflects this idea: "One-sided termination of contract in the absence of a contractual provision allowing it is possible only if there is a significant breach of contract or if it is provided by law. A significant breach of a contract is such that the other party to a significant extent loses what he was entitled to in the conclusion of contract." (Article 450)

Contracting parties can together quite freely stipulate on a termination clause. The length of the termination period can also be agreed, but in the absence of it, the minimum length of the termination period is thirty days (Article 452). Special legislation can stipulate on longer termination periods, e.g. in case of lease or rent contracts. Legislation also allows special reasons for claiming for one-sided termination of e.g. lease contracts.

The CISG does not contain a stipulation similar to Article 450 GK, but does permit termination in "*impediment beyond control*" either temporarily or permanently. If nothing else is agreed in the contract, only natural disasters or decrees of state authorities making the contract impossible to perform, are accepted in courts as grounds for non-delivery (CISG Article 79). The Russian domestic regulation is similarly strict calling the impediment the force, which could not have been prevented. A contractual clause, in which the grounds for non-delivery are regulated, is called a *force majeure* clause. Based on either a force majeure clause or Article 79 of the CISG or the Civil Code Article 401, the delivery may be postponed or the contract terminated.

The CISG does not recognize economic *hardship*, but in more recent contract law and in some international collections of principles changing economic circumstances (hardships) may lead to modification or termination of contract. In UNIDROIT Principles hardships lead to renegotiations, after which the court can free the other party from liability, if the renegotiations fail (Articles 6.2.1. – 6.2.3.). Russian civil code has borrowed the requirements of early termination or modification from UNIDROIT principles, but not the possibility for

the court to urge the parties to renegotiate. The Principles of European Contract law mention circumstances which have become too onerous for a contracting party (Article. 6.1.1.).

These international principles are not binding legislation, but they can be chosen to be applied to contracts. International arbitrators often try to find assistance in them even if they would not bind the parties. Hardship is an example of non-binding regulations, which in the New Merchant law discussion is urged to be accepted as legally binding rules in disputes on international commercial contracts.

Finnish and other Nordic contract laws allow unfair contracts to be modified or terminated if circumstances have become unfair or if the stronger party already from the beginning has misused its power to make the other party conclude an unfair contract (Nordic Contracts Acts 36§). This tool, which now is interpreted to be applied also in hardship case, is applied very cautiously in courts, especially when it comes to business contracts. Consumer protection may, however, allow modification of a contractual provision, which is unfair to the consumer. Some other countries, such as Germany or France have black lists of illegal unfair terms of contract. The result of applying those rules is usually similar to the modification of unfair contracts in the Nordic countries.

The Russian Civil Code adopted a possibility to ask for termination or modification of a contract in court owing to significant changes of circumstances. This article 451 is not only a hardship rule, since it can in principle be applied in all significant changes of circumstances where if the other party had foreseen the circumstances, that person would not have concluded the contract. Four additional conditions must be fulfilled before the court can adjust or terminate the contract. Firstly, the change has to be such that the parties could not have foreseen it when the contract was made. Secondly the change could not have been overcome with the carefulness and diligence which is characteristic for similar contracts. Thirdly, the performance of the contract without changing it would violate the balance of property interests of the parties and involve the interested party such a damage that he would have considerably lost what he was entitled to expect at the conclusion of the contract. Fourthly, the court has to check that there is not an established trade custom of risk-sharing to be applied to the case.

Although this provision has existed from 1994 in the Civil Code, the courts have not applied it, although Russian economy has experienced drastic changes - or perhaps exactly because of them. Text books treat article 451 in a very abstract manner[41] or not at all.[42] In a commentary from 1996 it is mentioned, however, that for instance such a change in the currency value of the Russian ruble that the stock market crisis in 1994 (11.10.1994) represents, could not have been foreseen.[43] Although the economic depression of 1998 could also have fulfilled the requirements of article 451, there were no cases in courts claiming for modification of contracts. It has never been tried at the Highest Court of Arbitration. The reason may be that modification is too new and strange for Russian lawyers. Disputing parties seem to find it easier to try and claim for invalidity instead of trying to apply the article 451.

3. Contracting practice

3.1. Control of Authorities

Contracting culture in Russia is rooted in the socialist past, when contracts were devices of control in fulfilling the state economic plans. Contract document became formal and rigid, something similar to official state documents. The public sector red tape contaminated contracts with excessive rigidity. When Russia in the beginning of 1990s became a market economy, the red tape practices spread also into business. This quite large formal part of business is administrative by nature. Contract documents are connected with bureaucratic red tape and they require formality.

The nature of state control is well indicated in the following quotation of a Finnish manager running a company in Russia:

[41] Kommentarij chasti pervoj grazhdanskogo kodeksa Rossiiskoj Federatsii dlya predprinimatelej (1996) Red. V Kuznetsov and T. Braginskij. Redaktsiya zhyrnala khozyaistvo i pravo. Moskva.
[42] Braginskij, M. I and Vitryanskij V. V. (1999) Dogovornoe pravo. Kniga pervaya. Obshsie polozheniya. Moskva: Statut.
[43] Comment of the Civil Code of the Russian Federation (part I) (Article-by-article)/Edited by Sadikov O. N. M., 1997.

> You need to get a bunch of approvals: one should approve, then another, then a third person has to make his verdict and so on. There was a funny case, while we tried to get the approval, 1,5 years passed.<…>So while we were collecting all the necessary documents in various committees: the committee on urban planning, historic and architectural committee, etc.; waiting for all the possible permits, resolutions and approvals; the head of, I don't remember which instance, it was one of departments of administration of the area X in St. Petersburg, he was replaced by another person. And when we brought all the documents, he didn't approve it and just said: "I can't believe that you have all the required permits." And we had to talk to this person for a very long time without bribes or something like this, and finally we got his approval. The funniest thing is that on the following day after we received his permission, the ordinary officers of Road Police came to our premises and started asking, who is the boss here and why did we put the terrace? And they were really surprised when, instead of calling to some authorities, we showed them all the required documents and permits, saying to them: "Look, all our documents are legal, we have all the required permits." (manager_Fin)

This example is quite typical and revealing and shows that the control of authorities is strict, but arbitrary. Therefore, conduct of business strictly according to the rules may confuse the authorities, since Russian business often choose to find faster, but more risky informal ways with dealing with permissions. Confusion of authorities indicates that informal institutions are strong and used for other than strictly control purposes. The following quote demonstrates how foreign businessmen, who come from low-context cultures and countries, where formal institutions are strong, would understandably prefer transparency and legality in governmental control:

> It would be much better if the rules of the game were more open and obvious. Our ability of managing our business will depend on governmental control, and we hope that joining the WTO will change this situation. (manager_USA).

3.2. The Need for a Reliable Assistance

Since formal institutions are weak, foreign business needs to know, how the informal practice works. For this purpose they need someone, who is reliable and knows how to deal with

governmental authorities and business partners, but does not get the company in trouble with the legal system and authorities.

> I think it should be a person who is both honest and knowledgeable in the business sphere. Anyone who has opened a business there [in Russia] says that it is the most important thing. You have to find an honest man, and you know that this is the most difficult aspect--to find such a person. (expert_develop).

When the foreign company does not operate directly in the Russian markets, but only exports products, it is easier to leave dealing with Russian authorities to their Russian cooperation partners. Finnish forest companies preferred to use small Russian entrepreneurs to deal with the authorities on the Russian side of the boarder, and sometimes not even care, how they managed to find ways out by using informal methods. Closing one's eyes is more difficult when the company is already established in Russia. It may also be dangerous even when the company operates from the home base. The example of Stora Enso being blamed for illegal loggings in Russian Karelian forests is quite revealing. A contract with the sub-contractor leaving the liability for violations of Russian law to the latter does not free the foreign company from liability in the eyes of the clients in the Western markets.[44] This is a good example of the weakness of legal centralism. A company, which has not violated legal rules and is not legally responsible for its cooperation partners may more effectively be sanctioned by losing its reputation in the eyes of its client than in the courts.

Sometimes the trust in a reliable Russian partner may be dangerously strong. In the interview study of wood importing companies in Finland a representative of one small Finnish company stated that a Russian lawyer writes their contracts in Russian on behalf of their Russian business partner. The small company did not even bother to invest in translating the contracts into Finnish or English, because it was costly and they simply chose to rely on their business partner. The manager was of the opinion that formal requirements were requirements of Russian legislation and a Russian lawyer knows how to deal with them. Such an opinion indicates that Finnish businessmen also saw that the informal part of the deal is

[44] Nysten-Haarala, Soili (2006) Contract Law and Everyday Contracting. In Peter Wahlgren (ed.) Scandinavian Studies in Law. A Proactive Approach. Stockholm Institute for Scandinavian Law, Vol. 49. Stockholm, 263-283.

what counts between business partners, not the formal document.[45] The attitude of this particular businessman may also indicate a mixture of understanding Russian informal rules and Nordic small business culture, where a handshake is enough. You simply have to take risks in business.

3.3. Requirements concerning the Form of the Contract

The need to write formal contracts in the Russian rigid and official way seems to be an unexpected finding even for international businessmen, who have worked globally and have experience in many different contract and business cultures:

> Most agreements in America are sealed with a handshake. In Russia, people are very rigid and the business climate is very strict: even the main points about the contract that were discussed during the meeting need to be noted in the protocol and signed by all participants of the meeting. I have never done anything like this in any of the countries I have worked, neither in Brazil, the United States, nor in India. That is a big difference. (manager_USA).

Formal contracts need to be very detailed and all the changes also have to be in a written form because of the tight government control. Discounts, which are given afterwards, may confuse tax officials, who require proof of any change, which may affect on the taxed amount of profit. Although only a few contracts end up in courts, the practice of *arbitrazh* courts of not accepting oral contracts strengthens the formal practices of business contracting.[46] The courts simply interpret the Civil Code, which gives the written form as a formal requirement, although other materials can be used in interpreting the content of the contract in court. Even after the recent changes in civil law, oral proof is not necessarily accepted in Russian courts.

> I: What is the level of detail with regard to the requirements that each side needs to fulfill in the contract?
> R: Very detailed, up to ... any discount is prescribed in a supplemental agreement, that is, there are clients who have some special arrangements with us, they receive benefits and so on. For each bill we have a supplementary agreement, some people have piles of such

[45] *Op. cit.*
[46] Hendley, Kathryn (2001) Beyond the Tip of the Iceberg. In Peter Murrell (ed.) Assessing the Value of Law in Transition Economics. Ann Arbor, Michigan University Press, 20-55.

> contracts. The contract itself is very basic – everything is written down: the terms of payment, the terms of granting power of attorney to an employee who arrives for a bill of lading, everything. (manager_Germ)

3.4. Changes in Circumstances

Rigid contracts are, however, not necessarily complied with. Business partners may agree to make changes or implement the contract differently from the formal document. The study on wood importing companies revealed that Finnish companies valued continuing cooperation and were ready to adjust to changed circumstances. However, if the partner turned out to be unreliable, they simply found a new business partner and dropped the old partner out when their fixed-term contract for one year ended.[47]

There is also systemic negligence in implementing contracts. Contract regulations are regularly violated, but this rarely leads to any sanctions. Some managers stated that delayed payments for services are a frequent nuisance. Timely payment is even exceptional and delaying payments some kind of customary practice of the market:

> I: To what extent do contract parties honor the agreements? That someone didn't do something on time or didn't pay, does that happen?
> R: In general, it is difficult to control it, because we have too much clients. We can't … I mean, we see, that there is an unpaid bill. The accountants already noticed it, they call and ask – why don't you pay? But, as a rule, there are a lot of clients that don't pay until the last moment. And the only way to get money from them – is when they are ordering the next container, we first look at their debts. Until our financial department allows us to process the order, our import department doesn't issue the necessary documents to our clients. First of all we look at the clients' debts and tell them – you have unpaid bills. They immediately start whining – how could it be? Please, give us a container and so on. They try to use all possible tricks.…In general, anything they can come up with. And we look at debts – no, you have an unpaid bill. But we can only do that before sending another shipment. If we have already sent them a container, it is very difficult to do it post-factum. Because we have a lot of other stuff to do – we can't trace everything. That's why, actually, the payment period of five days is rarely observed. (manager_Germ).

[47] (Nysten-Haarala 2006)

According to Kathryn Hendley since 1993 at least 40 percent of the contractual disputes in *arbitrazh* courts have involved non-payments.[48] She describes non-payment as almost epidemic.[49] Our more recent study proves that non-payment is still a practice in Russian business. A search from the database of Russian *arbitrazh* court concerning years 2011-2012 reveals that the three companies, which we interviewed have sometimes also resorted to courts in order to get their payments. All cases, which they were involved in, concerned claiming for payments.

According to Kathryn Hendley the practice started with the reforms of 1990s, when the whole economy suffered from non-payment: salaries were not paid, the government did not have money and the privatized business was to a great extent near bankruptcy.[50] Non-payment up till the last possible moment must have been a practice also earlier, since pre-payment was an established practice in foreign trade during the Soviet Union. According to interviews in 2004 prepayment was still an ordinary contractual clause in sales contracts with Russian partners. The Finnish wood buyers, however, did not all apply prepayment, but explained that banks function quite normally and that the price can be paid safely on a Russian bank account of the seller. Based on the interviews of Russian sellers of wood, Finnish buyers were very popular, because they were reliable.[51]

Obviously paying on time was an advantage on a market, where not paying or paying as late as possible is epidemic. Prepayment could have encouraged delivering lower quality, since quality control was the weak part of wood trade. Wood buyers, however, had the advantage of long-term relations, which allows corrections of quality, quantity or price with the next lot. This, however, is a bit complicated, because all adjustments of contract had to be written for the sake of customs and tax control.

The practice of not paying can be interpreted to indicate low respect of formal rules of the game and a "who cares "- mentality. Claiming invalidity of the contract in court as a counter claim to the claim for payment of the seller gives an impression that non-payment is not even

[48] Hendley, Kathryn (1998) Temporal and Regional Patterns of Commercial Litigation in Post-Soviet Russia. Post-Soviet Geography and Economics 39 (7), 379-98.
[49] Hendley (2001).
[50] *Op. cit*
[51] (Nysten-Haarala 2006)

regarded as a loss of reputation and that all methods can be used no matter how absurd it may seem. In other words, non-payment is not exceptional and far from being shameful.

The practice of not paying before the last minute may on the other hand simply represent a business adjustment of the market. If paying on time is not effective in the circumstances of Russian markets, avoiding paying as long as possible will become the rule of the game.

4. The Role of lawyers and courts in Russian business

The profession of a lawyer, let alone a company lawyer, was not highly appreciated in the Soviet Union. The work was quite administrative, consisting of writing claims (*pretenziia)*[52] and checking that contracts correspond with the formal legal and administrative rules. Nowadays the profession is more highly valued. The work of a company lawyer is still quite simple. Contracting remains quite rigid and formal, and the lawyer is there to check that all the rules and numerous regulations are fulfilled and that the contract will be legally binding. Company lawyers also take care of court cases. Simple non-payment cases are not legally challenging. Company lawyers also claim that disputes with tax officials are easy, because the tax officials are unprofessional and the Tax Code favors tax payers with allocating the burden of proof strictly on the tax officials (Article 22 of the Tax Code).

The amount of invalidity claims as counterclaims towards non-payment claims indicates that the court procedure is played strictly with the rules of lawyers without taking business needs into consideration. Disputes, as soon as they have entered courts, are totally out of the hands of businesspeople. Reputation in business does not seem to count any more. Hopefully the recent reforms of the civil code will diminish artificial claims for invalidity.

Furthermore, Russian business tends to turn to the courts quite often. The fear of losing reputation or showing a failure with ending up in court does not seem to be nearly as high as it is in the western countries. Russian courts are also much better than their reputation. Ordinary people suspect that courts and judges are corrupted or arbitrary, but this probably

[52] *Pretenziia* is a claim for a company, which has not paid, or has delivered lower quality than agreed to deliver correct quality or pay damages. Without a *pretenziia*, the court would refuse to take the case.

only reflects the general tendency of corrupted practices and the constant complain about them in Russian society. Courts and *arbitrazh* judges, however, enjoy about similar level of respect both among the general public and businesspeople than their counterparts in Great Britain.[53] Respect for courts and ethical standards of the judges are actually much higher than for any other institution in Russia.[54]

In surveys foreign businessmen express great wariness toward the impartiality of Russian courts. They fear that courts would favor the Russian party to the dispute. The fear may simply indicate prejudice of foreign businessmen, because statistically there is no evidence of partiality of Russian courts. On the contrary, Glenn P. Hendrix reports on good experience of Western lawyers who have litigated in Russian *arbitrazh* courts. He, however, reminds that lawyers may have a need to exaggerate the effect of court proceedings to outsiders.[55]

Private commercial arbitration is not as much applied in Russia as in the western countries. The reason may be that it is a new institution, which has not developed yet. Disputes of foreign trade were taken before the Chamber of Commerce and Industry of the RF (earlier USSR) in the Soviet period, but there was no practice of domestic arbitration. Company lawyers claim that disputes take a longer time in private arbitration because "*the arbitrators do not work full time in arbitration and because their professional quality is not necessarily high*". Ordinary *arbitrazh* courts are preferred instead of commercial arbitration because of the speed and quality of the work. Legislation on commercial arbitration, which was issued in 2002, provides with rules for similar private commercial arbitration than in western countries. It is, however, possible that Russian business complains easily on awards, which are not decided on their own favor. *Ordre public* may be more easily discovered, and since arbitration is new, there may be more mistakes.

[53] The percentage of the general public relying on the legal system either a great deal or quite alot was 38 % in Russia and 68 % in Great Britain. The figure for purchasing managers is 34,9 % in Russia and 35 % in Great Britain (World Values Study Group in 1991 reported by Hendley, Kathryn, Peter Murrell and Randi Ryterman (2001) Law Works in Russia: The Role of Law in Inter enterprise transactions. In Peter Murrell (ed.) Assessing the Value of Law in Transition Economics. Ann Arbor, Michigan University Press, 56-93, (p. 60).
[54] Hendley& al. 2001.
[55] Hendrix, Glenn P. (2001) Foreign Litigants in Russian Commercial Courts. In Peter Murrell (ed.) Assessing the Value of Law in Transition Economics. Ann Arbor, Michigan University Press, 94-132.

Alternative dispute resolution such as mediation is not wide spread in Russia. There is, however, a law on ADR from 2010, which means that mediation is encouraged and can in course of time increase as well as arbitration and other means of alternative dispute resolution. In Russia it is very important that subsequent legislation exists. Otherwise the institution is non-existent and avoided. Regulation, however, can lead to too rigid and clumsy practices for the sake of state control.

Bilateral means of negotiations, however, are widely used and business partners actively use informal methods for solving problems in the contractual relationship. The world of informal rules is, however, not always a simple one, since it is hidden and closely interactive with the rigid formal rules. Application of informal rules has to be learned in practice and often through making mistakes. The weakness of formal rules and the strength of often hidden informal rules make Russia a challenging market for foreigners.

5. Conclusions

A sharp distinction between formal legal rules and informal business rules is typical in Russia. The strong legal centralist approach of lawyers means they do not care for such disparities, but focus only on legally relevant problems. As in western countries, lawyers specialize only on law without paying too much attention to business rules and practices. Lawyers are there to check the legality of rigid documents and take care of disputes in courts. The gap between law and business is even wider in Russia than in the western countries, although the legal centralist attitude in principle is the same.

The special feature in Russia is that rigidity of rules and the existence of excessive and arbitrary control leads to avoidance and circumvention of formal rules, which are regarded as strange and unnecessary. When formal rules are not respected, they are more easily neglected. The formal legal default rules themselves do not greatly differ from their counterparts in western countries, although Russian text books make a distinction between domestic and international contract law. The emphasis on formal requirements is a remnant of the soviet past and a sign of a legal centralist attitude, which exaggerates the power of legal rules. The lower status of trade usages and business practices can also be interpreted to

indicate strong legal centralism and as need to control contractual relations in spite of the newly born freedom of contract. Recent changes of the civil code have, however, diminished formal requirements.

The tendency to misuse legal rules, which were created in order to protect business, sometimes leads to absurdities. Loopholes are constantly amended, but that does not prevent creative misuse of law. Flexibility is often creative circumvention of formal rules, which creates inefficiency in business. Content capabilities of Russian lawyers seem to cover only knowing the formal rules and requirements of law. Such an attitude makes lawyers focus on lawyering tricks instead of drafting proactive contracts, which serve business in the long run.

Not only law, but also business practice often appears to be rigid. The reason for this rigidity is the requirements of the bureaucratic administration. Formal contract documents are made neither for business purposes nor for potential court disputes, but to cope with the rigid administrative control of state authorities. There are certainly informal ways to circumvent the rigid control, but foreign businesses are more vulnerable than domestic business for claims of illegal practices on the part of authorities. Formal and rigid rules as well as their arbitrary applications, seem to lead to circumventing and ignoring them as well as to low respect of authorities. While in western societies the role of authorities is considered to be creating a favorable framework for business to operate, in Russia it obviously seems to be controlling businesspeople from resorting to illegal practices. Excessive control of authorities, however, makes business vulnerable for bribery and other means to speed the work of authorities.

Rigid business practices because of the scrutiny by authorities reflect only the surface of Russian rules of the game in business contracting. Under the surface, informal practices can be flexible. The surface can be broken only by creating trust and managing to maintain it with the business partners. Hidden practices may not be rigid and complicated once they are discovered and properly understood. Flexibility has to be created based on personal relations and trust. Relational capabilities of contracting are the more valued, the more formal rules are rigid. Local informal rules are an important part of the Russian plurality of norms. Ignoring them is going to lead to inefficiency and constant struggles with formal rules and control of the authorities.

The strength of informal rules may also keep Russia separated from international practices. Russia does not seem to bend to international (American) practices of contract drafting, but keeps to its own. There is a certain barrier for international business constituted by the rigid formal rules, which require excessive transaction costs and by the hidden informal rules, which require effort and costs to attain familiarity. The distinction between domestic and international contract law also leads to specialized lawyers of international trade and international arbitration.

Although the multiplicity of norms is visible in Russia, the effect of globalization in contracting practices seems to be rather limited. The reason, however, is not a strong nation state with strong formal rules, but on the contrary, weak formal rules and strong informal practices, which have developed in order to enable business survive in the world of strict formal rules.

Courts are not as bad as they are claimed to be - at least compared to their western counterparts. The Russian federation has actually invested a lot in courts, which are regarded as the engines of the rule of law. Court practice, however, has preserved administrative practices from the soviet times. These practices require excessive use of courts in such issues as non-payment. In the western countries courts are not regarded as creators of rules for the business, but as the last resort when something goes wrong. In Russia courts seem to be one available alternative among others to solve disputes. Court procedure seem not be avoided as eagerly as in the Western countries. Maybe courts are also used a lot, simply because court decisions are needed for enforcement even in clear non-payment cases.

Flexibility in Russia can be practical agreeing and setting rigid formal rules aside when they are too complicated to apply. In this way flexibility saves excessive transaction cost. Flexibility can, however, also be unwanted, when informal rules require a lot of transaction costs to get familiarized with. Flexible contracting culture is on the one hand a necessity when contract law is too rigid. On the other hand it can develop traps for even experienced businessmen.

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