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ANATOMY OF THE 1994 CIVIL CODES OF RUSSIA
AND KAZAKSTAN: A BIOPSY OF THE
ECONOMIC CONSTITUTIONS OF TWO
POST-SOVIET REPUBLICS

*Christopher Osakwe**

I. THE OVERTURE: THE TAXONOMY OF THE TWO CIVIL CODES

In what looked like a synchronized action, the lawmakers of Russia and Kazakstan—economically the two most powerful post-Soviet republics—unveiled their new post-socialist civil codes in November and December 1994, respectively. With a stroke of the pen, reformist President Boris Yeltsin of Russia on November 30, 1994, relegated the Brezhnev-era Russian Civil Code of 1964 to the museum of antiquity

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Right after my first fortuitous meeting with Mary Ann Glendon in the fall of 1975, she instantly became my professional inspiration and intellectual spark plug. A few years thereafter she became the polestar in my career and an esteemed colleague. At the time of our first meeting I was just a novice on the law faculty at Tulane University and she was already a rising star in the field of comparative law. The setting for our meeting was a guest faculty lecture that Mary Ann delivered at Tulane. Her topic dealt with an aspect of family law which in the hands of an ordinary mortal would have resulted in dry and technical exposé. Instead, Mary Ann turned her lecture into a tour de force in comparative family law as she wove into a beautiful tapestry ideas taken from the family laws of Germany, France, England, and the United States. Her lecture immediately struck a raw nerve with me when she touched upon the Marxist views on the family. Her Tulane visit continued at a faculty dinner in one of the finest restaurants in the city. How could a visit to New Orleans by a distinguished professor from the culinary backwaters of Boston not include a five-star dinner? Southern hospitality dictated such treatment of our honored guest from Boston College. During dinner Professor Glendon peppered her small table talks and toasts with witticisms drawn from a common theme—comparative law.

and ushered in a new era in the history of Russian commercial law. The same silent revolution was replicated in Kazakstan when on December 27, 1994, the President of the Republic of Kazakstan, Nursultan Nazarbaev, ratified the Civil Code that was adopted by the Supreme Soviet of the Republic of Kazakstan and by so doing signed the death warrant of the Kazak socialist-era Civil Code of 1965. The 1994 civil codes of Russia and Kazakstan are linked not only by the accidental coincidence in the timing of their promulgation. In fact, these two post-Soviet civil codes are ideological siblings—they share a common genealogy, have the same genetic traits, profess the same economic philosophy, suffer from the same congenital disease, enjoy the same quasi-constitutional status that is unprecedented in Western law, are both test tube babies that were conceived by in vitro fertilization in a textbook-perfect feat of genetic engineering, both function like potted plants in their respective societies, and both were triggered by the same catalysts. Both codes will go down in history as superb examples of successful legal transplantations and as living monuments to comparative legal science. What is perhaps most remarkable about these two civil codes is that they successfully wove ideas borrowed from three disparate legal traditions—continental European civil law, Anglo-American common law, and socialist law—into a beautiful tapestry that can only be described in French as a *melange parfait*.

Two years after our New Orleans acquaintance I discovered yet another aspect of Mary Ann's intellectual breadth—her Catholicism upon which she founded her perspectives on the law. Her Catholic angle to comparative law sparked a new direction in my own research. In the Glendonite tradition I began to see a theological *leit motif* in Soviet socialist law. Thanks to the influence of Mary Ann Glendon on my thinking, the theology of Soviet law became the core thesis of many of my writings in the field of Soviet law.

Over the years I had stayed in close touch with Mary Ann and frequently sought her advice on several career decisions. In 1982 and 1985 I had the distinct honor of co-authoring with her and Professor Michael Gordon two textbooks on comparative law which went into a second edition in 1994. As the Russians would say, Mary Ann Glendon was the intellectual leader of our troika.

On the occasion of her sixtieth birthday I salute Mary Ann from my distant location at the other end of the world in Kazakstan where I am trying to practice what we have together preached over the past two decades, *i.e.*, assist in the transplantation of Western legal models into the legal system of post-Soviet Kazakstan. From Almaty, Kazakstan to Mary Ann in Cambridge, Massachusetts all I wish to say is thanks for all your help during the past twenty-three years of our working relationship, keep the comparative law torch burning and, as the former President Ronald Reagan would have said, stay the course. My piece in this *festschrift* is a token symbol of my deep gratitude to a decent individual and a towering figure in our common cause—comparative law.

The true heroes of the Russian Civil Code of 1994 are the Russian civilists (civil law scholars) who, with the benevolent assistance of their Dutch masters and American consultants, crafted a code that will go down in history as one of the great civil codes of the twentieth century. Even though they were "born" only one month apart, the life of the Kazak Civil Code¹ is strongly influenced by the Russian Civil Code.² In fact, the Kazak Civil Code is nothing more than a reconstructed version of the Russian Civil Code. In German, both the Russian and Kazak Civil Codes of 1994 would be aptly described as *professorenrecht* ("the law of professors"), in the sense that the critical phases of the making of these two codes—from conception through the three trimesters of gestation—were carefully guided by law professors. Because the character of the Kazak Civil Code can best be understood when viewed against the backdrop of the Russian Civil Code, from which it derives its character-forming traits, each one of the eight sections of this analysis will begin with an examination of the taxonomic features of the Russian code. That will be followed by a discussion of the points of benign departure of the Kazak Code from its Russian prototype.

To conclude this introduction, let me interject a brief historical note. The history of commercial law in Russia may be divided into two periods: pre-1991 and post-1991. For purposes of this analysis, the first period (1917–1991) will be referred to as the Soviet or socialist era; the second period (1991–present time) as the post-Soviet period. During the Soviet era, the notion of commercial law was anathema to the socialist legal mind. The two Russian civil codes of this period—the Civil Codes of 1922 and of 1964—were founded on the Marxist-Leninist legal philosophy, according to which all law is public law. Consequently, these two Russian civil codes neither recognized private law nor embodied any provisions on commercial law. The history of commercial law in Kazakstan mirrors the situation in Russia. A major break with the Soviet past in both Russia and Kazakstan came with the adoption of the Fundamental Principles of Civil Legislation of the USSR and the Union Republics (FPCivL) of 1991, which in turn

1 GRAZHDANSKII KODEKS RK [GK RK]: Obshchaya Chast [hereinafter *Civil Code of Kazakstan: First Part*]. Adopted by the Supreme Soviet of the Republic of Kazakstan on December 27, 1994; signed into law by the President of the Republic of Kazakstan on December 27, 1994.

2 GRAZHDANSKII KODEKS RF [GK RF]: Chast Pervaya [hereinafter *Russian Civil Code: Part One of 1994*]. This first part of the Civil Code of the Russian Federation was adopted by the State Duma on October 21, 1994; it was signed into law by President Boris Yeltsin on November 30, 1994. For the most part, it went into effect on January 1, 1995.

marked the beginning of a carefully calibrated evolution of commercial law in post-Soviet Russia and Kazakstan. The evolutionary process that started in 1991 culminated in a crescendo in 1994 in both countries, where the greening of commercial law did not result in the adoption of a commercial code that is separate and distinct from the civil code. Rather, the rules of the nascent commercial law of these two post-Soviet republics were housed within an enlarged civil code, following an experimental trend in some continental European countries. Even though the two civil codes embody rules of both civil and commercial law, the thrust of this study is on the commercial law components of these codes.

A. The Russian Civil Code of 1994: Westernized, Yet With a Lingering Touch of Soviet Nostalgia

In both form and substance, the Russian Civil Code of 1994 is unmistakably Western. However, the authors of this code made the calculated decision not to sever the umbilical cord linking this modern code with its Soviet socialist past. Consequently, the code is post-Soviet, but not ahistorical; it is Western, yet remarkably Soviet; its break with the past is evolutionary, not revolutionary.

Notwithstanding its many similarities to continental European civil codes, the Code has no analogue in Western law. It is uniquely Russian and a trailblazer of sorts. Put quite simply, its character is a composite of six traits: its substantive provisions are fundamentally pro free enterprise; its architectural design is inspired by Western models—notably the Dutch, Italian, and Swiss prototypes; it retains certain congenital defects which it inherited from pre-1991 Soviet socialist law; and its style (vocabulary and legal fictions) is firmly rooted in the continental European civil law tradition. In other words, the 1994 Russian Civil Code is capitalist in contents, Western in its architecture, suffers from an endemic Soviet socialist disease, and belongs to the family of continental European civil codes. In addition to these four features, the Russian Civil Code manifests two character traits which make it unique among continental European civil codes—the phenomenal breadth of its coverage and its quasi-constitutional status within the Russian legal system. It is the exceptionally long arm of the Code that enables it to touch virtually every aspect of Russian private law that makes it truly the economic constitution of Russia's post-Soviet market system and the queen of the country's nascent private law.

A prominent but not unprecedented feature of the Code is that it merges into one code two traditional continental European private law codes—the civil and commercial codes. Even though the Russian

decision to fuse the civil and commercial codes into one omnibus civil code follows the example of the civil codes of Holland, Italy, and Switzerland, the scope of its subject matter goes much further than those of its European prototypes. The Russian Civil Code regulates virtually all elements of private law, with the notable exceptions of family law (which in Soviet legal tradition had never been a part of the civil code), housing law, and transportation law. Unlike any other continental European civil code, which is equal in status with any other civil legislation and whose relationship with other civil legislations is governed by the principle of *lex posterior derogat priori*, the Code enjoys the status of being the *primus inter pares* in relation to other civil legislations and serves as the litmus by which the validity of all other civil legislation is determined. According to Article 3(2)–(3) of the Code, if there is a conflict between a provision of the Civil Code and that of any other civil legislation, regardless of which of these provisions was later in time, the Civil Code will always prevail. In other words, the supremacy of the Code over all other civil legislation is absolute. The irony of this hierarchical arrangement of Russian civil legislations is that the supremacy clause in Article 3 of the Russian Civil Code does not have any explicit support in the 1993 Constitution of the Russian Federation. At best this arrogation of constitutional authority by this Civil Code may find some justification in the penumbras of Article 71 of the Russian Constitution of 1993.

There are two possible reasons why the authors of the Russian Civil Code of 1994 chose to integrate the civil and commercial codes into one omnibus civil code: one is external, the other is entirely domestic. Right from the inception of the Code drafting project, the Russian drafters fell under the spell of Dutch consultants who sold them the idea of following the Dutch model and abandoning the traditional French-German approach of having a commercial code separate from the civil code. This external factor influenced the structure of the Model Civil Code for the Commonwealth of Independent States (CIS) republics which served as the immediate prototype for the post-Soviet civil codes of all CIS countries, including Russia,³ and eventually shaped the structure of the 1994 Russian Civil Code itself. But, in addition to acting under the tutelage of their Dutch masters, the drafters of the 1994 Russian Civil Code were unreservedly hostile towards the idea of having a commercial code that was separate from the civil code. Such a division reminded them of the proposed dualism of “civil” and “economic” codes which was advocated by the “eco-

3 See my discussion of the influence of the Model Civil Code for the CIS Republics on the drafters of the 1994 Russian Civil Code, *infra* Part III.A.

conomic law” school of thought that existed in Russian law during the 1960s and 1970s. The drafters of the 1994 Civil Code saw any such division of the codes into civil and commercial as an indirect attempt to resurrect the discredited “economic code” thinking in modern Russian law. In other words, even though the idea of incorporating the commercial code into the civil code was first practiced by the civil codes of Holland, Italy, and Switzerland, this unconventional idea was warmly received by the anti-economic law civilists in Russia. It proved to be a formidable weapon with which the antagonists of the Russian economic law school sought to bury for all times the thought of an economic code in Russia. (The proposed “economic code” was actually not a commercial code, but an “administrative code” intended to regulate the country’s command economy.)

The Russian Civil Code of 1994 was originally planned to be phased in three installments over a four-year period (1994–1998). The First Part of the Civil Code was adopted on October 21, 1994 by the State Duma of the Federal Assembly of the Russian Federation (the lower house of the Russian parliament) and signed into law (promulgated) by President Boris Yeltsin on November 30, 1994. Except for selected provisions which went into effect at different times, Part One of the Russian Civil Code went into effect on January 1, 1995. Part Two of the Civil Code⁴ was adopted by the State Duma of the Federal Assembly on December 22, 1995, and signed into law by Yeltsin on January 26, 1996. Part Two went into effect on March 1, 1996. It is anticipated that Part Three of the Russian Civil Code will be adopted by the State Duma sometime during the fourth quarter of 1998.⁵

Despite its Western character, or perhaps because of it, the new Russian Civil Code has not been able to permeate the Russian legal consciousness. It functions like a potted plant in a society which refuses to accept the rule of law as a social value. Like a potted plant, the Code decorates and brightens its surrounding environment, but is not biologically rooted in the ecological system into which it is transplanted. The law on the books is fundamentally different from the law in action. The Civil Code of 1994 does not command the trust, the confidence, the respect, or the embrace of the ordinary citizens for whom it was written. Because of the alienation between Russian

4 GRAZHDANSKII KODEKS RF: Chast Vtoraya [Russian Civil Code: Part Two] [hereinafter GK RF]. This second part of the Civil Code of the Russian Federation was adopted by the State Duma on December 22, 1995; signed into law by President Boris Yeltsin on January 26, 1996.

5 The contents of the constituent parts of the Russian Civil Code are discussed *infra* Part IV.

society and the imported Civil Code of 1994, the average Russian citizen does not yet view it as a vehicle for resolving civil law disputes. Ideally, a civil code should be a way of life and not merely a document to be ignored by ordinary citizens. At the present time the Russian Civil Code operates in a legal system that does not have a sophisticated legal culture—the average Russian citizen treats the Russian Civil Code with benign neglect and prefers to seek solutions outside the framework of the Code. Only time will tell if Russian society will accept the new Civil Code for what it is, as a way of life and not as a potted plant. There is reason to believe, however, that eventually Russian society will embrace the 1994 Civil Code and use it in the manner that was intended. In fact, some provisions of the Civil Code, notably the provisions dealing with civil defamation and compensation for moral harm, have quickly become the favorite weapons of Russian citizens—from the former First Deputy Prime Minister of the Russian federation (Mr. Anatoly Chubais) to the ordinary housewife—in their quest for civil justice.⁶ The average Russian citizen has quickly learned that this Code permits him to view money as a painkiller.

B. The Kazak Civil Code of 1994: Reconstructed Version of the Russian Civil Code

The Russian Civil Code of 1994 was “received” almost in its entirety in Kazakstan. During the process of reception, the Russian Civil Code was subjected to a minor cosmetic surgery designed to give it a Kazak flavor. However, none of the Kazak modifications to the Russian Civil Code affected the intrinsic character of the Russian prototype. Thus, the demonstrable differences between the post-Soviet Russian and Kazak Civil Codes are quantitative, not qualitative. Consequently, the Kazak Civil Code of 1994, like its Russian antecedent, embodies the six character traits that are enumerated above. In other words, the Kazak Civil Code of 1994, like its Russian sibling, is unmistakably Western, but with a touch of Soviet nostalgia.

Like the Russian Civil Code, the Kazak Civil Code also functions like a potted plant in Kazak society. The one difference between the is that in Russia the imaginary pot contains live plants, whereas in Kazakstan the pot contains artificial plants. By this I mean that the alienation between the civil code and society is wider in Kazakstan than in Russia; Kazak citizens’ distrust of the Civil Code is absolute, whereas in Russia it is relative. I believe that the process of bridging the gap between the civil codes and ordinary citizens will take a much

⁶ For the results of the writer’s survey of Russian public opinion, see *infra* Part IV.B.

longer time in Kazakstan than in Russia, for reasons which I articulate in Part VIII.A of this study.

It should be noted in passing that the 1965 Civil Code of the Kazak Soviet Socialist Republic (KSSR) (the immediate predecessor to the Kazak Civil Code of 1994) was also a carbon copy of the 1964 Civil Code of the Russian Soviet Federative Socialist Republic (RSFSR). The difference this time is that the decision in 1994 to adopt the Russian model was a voluntary act of a sovereign state, the Republic of Kazakstan. By contrast, the decision to base the 1965 Civil Code of the KSSR on the 1964 Civil Code of the RSFSR was dictated by peculiarities of the Soviet federal system which required the laws of all constituent republics of the USSR to follow the pattern set forth in the corresponding Soviet federal laws as well as in the contemporaneous laws of the Russian Federation.

In Parts II through VII of this analysis, the core thesis that is set forth in Part I will be fleshed out. Lastly, Part VIII will offer some reflections on an overarching question: To what extent have the civil code reforms in the Russian Federation and in the Republic of Kazakstan furthered the cause of the rule of law in these two culturally different former Soviet republics?

II. THE ECONOMIC PHILOSOPHY OF THE TWO CIVIL CODES: FREE ENTERPRISE

The economic philosophy of the post-Soviet civil codes of Russia and Kazakstan may be reduced to one phrase—free enterprise. The codes exude capitalism. In almost identical language, the provisions of the two civil codes engrave the legal foundations of a capitalist system: the sanctity of private property, freedom of entrepreneurial activity, freedom of contract, equality of all actors in the marketplace, and tort liability of the government for causing harm to private interests. This is a complete reversal of the principles of the Soviet-era civil codes of Russia and Kazakstan, according to which private property was deemed obscene, freedom of contract was regarded as a fiction of bourgeois law, any form of entrepreneurial activity was condemned, the rules of the game were stacked in favor of the government participants in economic relations, and it was not a tort for the government to misgovern. Under the old Soviet tort law, both the government and the Communist Party of the Soviet Union were, except in a few instances, generally immune from tort liability.⁷ In what may be de-

7 For a general discussion of the principles of Soviet-era Russian tort law, see Christopher Osakwe, *An Examination of the Modern Soviet Law of Torts*, 54 TUL. L. REV. 1 (1979).

scribed as a complete metamorphosis, the new Russian law of governmental tort liability exposes the government to more tort liability than does, for example, the U.S. Federal Tort Claims Act of 1946. Let us examine in some detail these five philosophical foundations of the new civil codes of Russia and Kazakstan.

A. *Sanctity of Private Property*

The Russian Civil Code of 1994 treats private property as one of the cornerstones of a market economy, and proceeds to give a ringing endorsement to the concept of private ownership. Article 1(1) of the Russian Civil Code lists "the inviolability of property" as one of the fundamental principles of civil legislation. Article 212(1) recognizes two types of property, state and private, whereas Article 212(4) grants equal protection to the rights of all property owners, whether state or private. Article 213 states that "any property may be held in the ownership of citizens and legal entities, except for individual types of property, which, in accordance with law, may not belong to citizens or legal entities."⁸ This is followed by Article 213(2), with the stipulation that "the quantity and value of property held in the ownership of citizens and legal entities shall not be limited, with the exception of cases when such limitations shall be established by law for purposes specified by Article 1(2) of the present Code."⁹ The procedure for the taking of private property for public needs is spelled out in the Civil Code's takings clause, which is discussed in Part VI.B of this study.

Cumulatively, different provisions of the Russian Civil Code affirm the position that citizens may own private property; such private property is accorded equal treatment with state property under the law; subject to few exceptions which shall be specifically stipulated by law, there is no limit to the type of property that may be held in private ownership; there are no restrictions on the amount of any type of property that may be held in private ownership; and the state may not take private property for public needs without following the due process procedures stipulated in the takings clause in the Civil Code.¹⁰

Following the example of the Russian Civil Code, the Kazak Civil Code of 1994 elevates the sanctity of private property to one of its cornerstone principles. Article 2(1) of this Code lists "the inviolability of property" as a core principle of civil legislation. Article 191 defines private property and lists the types of objects that may be held in pri-

8 GK RF art. 213.

9 *Id.* art. 213(2).

10 The detailed regulation of private property rights under the Russian Civil Code is examined *infra* Part VI.G.

vate ownership. According to Article 191(2), any object may be held in private ownership with the exception of those items specifically excluded. Article 193 enumerates five objects that can be owned only by the state: land, minerals, bodies of water, forests (including all animals and plants therein), and “other natural resources.” If a private person can own a particular object, Article 191(2) states that “the quantity and value” of such private property shall not be limited by any law. The procedure for taking private property for public needs is regulated in the takings clause in the Civil Code of Kazakstan, which is discussed in Part VI.B of this study.

B. Freedom of Entrepreneurial Activity

Article 18(1) of the Russian Civil Code states quite affirmatively that citizens “may engage in entrepreneurial and other activities which are not prohibited by law.”¹¹ Under this legal regime, what is not specifically prohibited is generally permitted. This reverses the dictum of Soviet-era civil law according to which that which is not specifically permitted is generally prohibited. To back up this principle, the Code provides that “[a] citizen shall have the right to engage in entrepreneurial activities without the formation of a legal entity from the time he obtains state registration as an individual entrepreneur.”¹² The freedom of a legal entity, other than a state enterprise, to engage in any entrepreneurial activities that are not prohibited by law is enshrined in Article 49(1), according to which “commercial organizations, with the exception of unitarian [that is, state-author] enterprises and other types of organizations specified by law, may possess civil law rights and bear civil law responsibilities necessary for conducting any types of activities not prohibited by law.”¹³

The language of Articles 18(1), 23(1), and 49(1) of the Russian Civil Code is reproduced verbatim in the following provisions of the Civil Code of Kazakstan: Article 14—the right of a citizen to engage in any type of entrepreneurial activities that are not specifically prohibited by law; Article 19(1)—the right of an individual to engage in entrepreneurial activities without the formation of a legal entity; and Article 35(1)—the right of a privately-owned legal entity to engage in any type of entrepreneurial activities that are not specifically prohibited by law.

11 GK RF art. 18(1).

12 *Id.* art. 23(1).

13 *Id.* art. 49(1).

C. *Freedom of Contract*

Freedom of contract is enshrined in Article 1(1) of the Russian Civil Code as a fundamental principle of Russian civil legislation. The meaning of this freedom is spelled out in Article 1(2) to include the right to choose one's contracting partner, decide when to enter into contractual relations, determine the terms of one's contract, freely establish rights, and assume obligations under the contract.

Following the example of the Russian Civil Code, Article 2(1) of the Kazak Civil Code lists freedom of contract as a fundamental principle of civil legislation. The language of Article 2(2) of the Kazak Civil Code echoes the language of Article 1(2) of the Russian Civil Code.

The incorporation of the principle of freedom of contract into the 1994 civil codes of Russia and Kazakstan is a major departure from the rule under the Soviet-era civil codes of these two former Soviet republics. Under the old Soviet system of "planned contracts," contracting parties in a contract involving the participation of a state enterprise were not free either to choose their contracting partner or to determine the terms or timing of the contract. All such "planned contracts" were perfunctorily executed by the parties in accordance with the terms and timetable set forth in a binding economic plan, which was imposed on them by a state central planning agency called Gosplan. With the advent of free enterprise in these two former Soviet republics, both the Gosplan and planned contracts were relegated to the museum of Soviet socialist law. It should be noted, however, that the reception of the principle of freedom of contract in the post-Soviet civil codes of Russia and Kazakstan is not without certain exceptions. For example, during the conclusion of so-called "public contracts," the freedom of the contracting parties is severely restricted.¹⁴

D. *Equal Protection of Law*

If free enterprise is to flourish, it is critically important that there be a level playing field for all competitors in the marketplace, and that the transparent rules of the game apply equally to all participants. The Russian Civil Code of 1994 unqualifiedly embraces the principle of equal protection of law in the economic sphere. According to Article 1(1) of the Russian Civil Code, all participants in the relations that are regulated by civil legislation shall be equal. This means that if a

14 For a detailed discussion of the public contract exceptions to the freedom of contract, see *infra* Part VI.H.

state enterprise contracts with a private party, both participants are accorded equal protection under the law. More specifically, this means that if a state enterprise or agency steps into the marketplace, it agrees *a priori* to relinquish all claims to sovereign immunity with regard to any dispute that might arise from such commercial transactions. In other words, a state enterprise that participates in a commercial transaction can sue and be sued in the same manner and to the same extent as any private participant in the same transaction. Article 1(1) levels the playing field for all actors in the marketplace. For purposes of equal protection, the Russian Civil Code treats foreigners and stateless persons as equal to Russian citizens, subject to a few specific exceptions. The language of Article 1(1) of the Russian Civil Code is reproduced verbatim in Article 2(1) of the 1994 Kazak Civil Code.

E. Governmental Tort Liability

The two civil codes take the following positions: the government is capable of committing torts; subject to limited exceptions, the government should be held liable for its torts just like any private tortfeasor; and if an aggrieved party is not paid compensation for damages suffered as a result of governmental tort, the impact of a wrongful governmental action on private enterprise could be crippling. In recognition of this economic reality, the 1994 Russian Civil Code recognizes the right of an aggrieved private party to seek a tort remedy against the state for the wrongful act (action or non-action) of a government agency or official. In other words, under the new legal regime of the 1994 Russian Civil Code, it is a tort to misgovern. The principle of governmental tort liability is not new to post-Soviet Russian law, but it has been substantially expanded to include actionability for several governmental torts that were immune under the old law. The new Russian law subjects the government to tort liability for acts such as: unlawful sentencing to jail by a judge, unlawful criminal prosecution by a state prosecutor, unlawful detention by a police officer, unlawful search and seizure by the tax police, and unlawful administrative ruling by an official of the executive branch of government. The new law is enshrined in three separate provisions of the Russian Civil Code: Article 1069 (dealing with Liability for Harm Caused by State Agencies, Local Government Agencies and Also Their Officials) the language of which virtually replicates the text of Article 16 of the same Code, Article 1070 (regulating Liability for Harm Caused by the Unlawful Actions of Investigative Agencies, Agencies for Pretrial Investigation, Procurator's Office and the Courts), and Ar-

ticle 1071 (entitling Agencies and Persons Acting in the Name of the State Treasury in the Payment of Compensation for Harm Using Treasury Funds). The four provisions (Articles 1069–71, and 16) operate against the backdrop of Article 13 of the Civil Code, which sets forth the judicial procedure for voiding illegal decisions by state and local government agencies as a prelude to tort compensation to an aggrieved party. In almost identical language, the Kazak Civil Code follows the example of the Russian Civil Code in recognizing the concept and scope of governmental tort liability.¹⁵

III. THE GENEALOGY OF THE TWO CIVIL CODES: SOURCES OF INFLUENCES ON THE DRAFTERS OF THE CIVIL CODE

A. *The Russian Civil Code*

The Russian Civil Code of 1994 is as Soviet as it is Western. For inspiration, the drafters of the Code looked not only to the West but also to the Soviet past. The Code is modern, but it does not represent a revolutionary break with the past. In fact, the Code could not have broken all links with its Soviet past, since all of the drafters of the Code were themselves products of Soviet civil law and were deeply rooted in Soviet socialist legal tradition. From the standpoint of genealogy, the Russian Civil Code of 1994 is a fusion of ideas taken from five sources: the FPCivL of 1991; the Model Civil Code for the republics of the CIS; the Civil Code of RSFSR of 1964; Western civil and commercial codes (notably the civil codes of Holland, Italy, and Switzerland; the civil and commercial codes of France and Germany; the Uniform Commercial Code of the United States); and the Russian Constitution of 1993.¹⁶

1. Fundamental Principles of Civil Legislation of 1991

Perhaps the most important of the sources enumerated above is the FPCivL of 1991,¹⁷ which served as the dress rehearsal for the 1994

15 For a more detailed discussion of the new law of governmental tort liability under the 1994 Civil Codes of Russia and Kazakstan, see *infra* Part VI.F.

16 KONSTITUTSIIA RF [Russian Constitution] [hereinafter KONST RF]. The Russian Constitution was adopted at a national referendum on December 12, 1993.

The creative process of blending all of these disparate sources into one *melange parfait* is examined *infra* Part V.A.

17 A completely revamped version of the Fundamental Principles of Civil Legislation of the USSR and the Union Republics [hereinafter FPCivL] was adopted by the federal parliament of the USSR on May 31, 1991. See 26 Vedomosti SSSR, item 733 (1991). On July 14, 1992 the Supreme Soviet of the Russian Federation adopted a decree stipulating that until a new Civil Code of the Russian Federation is adopted

Civil Code. The *perestroika* process in Russia began in 1985, and the essence of this phenomenon was to transform Russia from a socialist society into a free enterprise system. Several legal reforms were undertaken between 1985 and 1991. In the area of private law, the cumulative results of the legal reforms under *perestroika* were neatly assembled in the FPCivL. The FPCivL abandoned many of the socialist concepts that were embodied in the 1964 Russian Civil Code and introduced several bold new ideas into Russian civil legislation. It represented a carefully managed break with the past and a bridge to the future. The FPCivL was a federal law, but was subsequently incorporated into the laws of the Russian Federation. Both the FPCivL and the 1994 Civil Code were phased in according to the following formula: those provisions of the Russian Civil Code of 1964 that dealt with matters that were regulated in the FPCivL were preempted by the FPCivL, and those provisions of the FPCivL that dealt with matters that were regulated by the new Civil Code were superseded by the new Civil Code. This means that, until all parts of the new Russian Civil Code are put in place, fragments of three bodies of civil law (the 1964 Russian Civil Code, the 1991 FPCivL, and the 1994 Civil Code) will continue to operate in the Russian Federation. The purpose of this three-way phasing-in was to ensure that there were no gaps in Russian civil law during the transition period.

2. Model Civil Code for the Commonwealth of Independent States

Next to the FPCivL of 1991, the other very important source of inspiration for the 1994 Russian Civil Code is the Model Civil Code¹⁸ for the CIS republics, which was adopted by the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States. The Model Civil Code was intended as a recommendation

and goes into force, the FPCivL of 1991 shall be applicable in the territory of the Russian Federation with the exception of those provisions which establish the jurisdiction of the USSR in civil law matters in the Russian Federation and those provisions which conflict with the Russian Constitution and other laws of the Russian Federation promulgated after June 12, 1990. See Postanovlenie [Decree] of the Supreme Soviet of the Russian Federation No. 3301-1, in 30 Vedomosti RSFR, item 1800 (1992). This decree stipulated that provisions of the Russian Civil Code of 1964 shall continue to have effect in the territory of the Russian Federation to the extent that they do not contradict legislations of the Russian Federation promulgated after June 12, 1990.

18 Model Civil Code (Part One) for the CIS republics was adopted at the Fifth Plenary Session of the Interparliamentary Assembly of the Member States of the Commonwealth of Independent States on October 29, 1994 as a "recommended legislative act of the CIS." Model Civil Code (Part Two) for the CIS republics was adopted at the Sixth Plenary Session of the Interparliamentary Assembly of the Member States of the CIS on May 13, 1995.

to the member states of the CIS to guide the drafting of their respective civil codes. Typically, each CIS member state would use the Model Civil Code as the skeleton upon which to build its own civil code. The Model Civil Code is essentially responsible for the fact that the civil codes of the individual CIS republics are quite similar in structure, contents, and philosophy. Like the Russian Civil Code itself, the Model Civil Code was also adopted in three installments. In fact, the drafters of the Russian Civil Code typically began drafting a particular part of the Code only after the corresponding part of the Model Code was handed down. Actually, there was a substantial overlap in the membership of the respective working groups that were responsible for drafting the Model Civil Code and the Russian Civil Code.

3. Western Civil and Commercial Codes

The third source of inspiration for the Russian Civil Code of 1994 is what I would refer to generically as Western civil and commercial codes. More specifically, this third source boils down to the civil codes of Holland, Italy, and Switzerland, the civil and commercial codes of France and Germany, and the American Uniform Commercial Code (UCC). Whereas the structure of the Code was influenced by the decision of Holland, Italy, and Switzerland to merge their civil and commercial codes into one omnibus civil code, the contents of the Code received direct inspiration from the civil and commercial codes of France and Germany, as well as from the American UCC. On some aspects of the commercial law rules in the Russian Civil Code of 1994, American law, especially the UCC, was a dominant source of influence. This was so primarily because the drafters of the Code received advisory assistance from a stellar lineup of American law professors who are nationally acclaimed experts on the UCC.¹⁹

4. Russian Civil Code of 1964 (Brezhnev Civil Code)

The fourth source of inspiration for the Russian Civil Code of 1994 is the 1964 Russian Civil Code.²⁰ Unwilling or unable to break totally with its socialist past, the 1994 Code retained a few of the institutions of the 1964 Code. Prominent among them are the concepts of economic management of state property in Article 114, operational administration of state property in Article 115, obligation to contract

19 A detailed discussion of the Russian Civil Code drafting process may be found *infra* Part V.B

20 The 1964 Civil Code of the Russian Soviet Federative Socialist Republic (RSFSR) was promulgated by a law of the RFSR on June 11, 1964. See 24 Vedomosti RFSR, item 406 (1964).

in Article 421(1) and (2), and administrative price fixing in Article 424(1) and (2). The principled decision to exclude family law from the Russian Civil Code of 1994 and instead to have a family code separate and distinct from the Civil Code is also a carryover from Soviet socialist legal tradition.

5. Russian Constitution of 1993 (Yeltsin Constitution)

The last source of influence on the 1994 Russian Civil Code is the Russian Constitution of 1993. This Constitution, like the Civil Code itself, bears the imprint of President Boris Yeltsin. The peculiarities of the Russian constitutional system, such as the federal system, the mechanism for the promotion of interstate commerce, the delineation of the jurisdiction of the federal government, and the free enterprise provisions of the 1993 Constitution, to a substantial extent shaped the contents of the Civil Code of 1994.

B. The Civil Code of Kazakhstan

With the exceptions of the Russian Civil Code of 1964 and the Russian Constitution of 1993, all of the other sources listed in Part III.A above (FPCivL of 1991, Model Civil Code for the CIS republics, and Western civil and commercial codes) were also direct sources of influence on the Kazak Civil Code of 1994. A fourth and most important source of influence is the Russian Civil Code of 1994. In fact, the other three sources were filtered to the drafters of the Kazak Civil Code through the prism of this Code. For what it is worth, the 1965 Civil Code of the Kazak Soviet Socialist Republic may be listed as the fifth source of influence on the 1994 Kazak Civil Code. However, because the core provisions of the 1965 Kazak Civil Code were fundamentally in direct conflict with the rules in both the Model Civil Code for the CIS republics and the Russian Civil Code of 1994, the drafters of the 1994 Civil Code of Kazakhstan did not derive any positive inspiration from the 1965 Kazak Civil Code. One could say that the influence of the 1965 Kazak Civil Code on the drafters of the 1994 Kazak Civil Code was a negative one, insofar as the 1994 Civil Code methodically sought to reject each one of the socialist law principles that were embodied in the 1965 Civil Code. In other words, the 1965 Civil Code served as an example of what the new Civil Code ought not look like. However, a handful of the socialist law principles taken from the 1965 Civil Code eventually made it into the 1994 Kazak Civil Code.

IV. THE ARCHITECTURE OF THE CODES: STRUCTURE AND SUBSTANTIVE COVERAGE OF THE TWO CIVIL CODES

A. *The Structure (Internal Divisions) of the Code*

The Russian Civil Code of 1994 is planned to be adopted in three installments. Part One was adopted by the State Duma on October 21, 1994, signed by the President on November 30, 1994, and went into force, for the most part, on January 1, 1995. Selected provisions of Part One were scheduled to go into effect at different dates before and after January 1, 1995. Specifically, the entire Chapter 17 of the Civil Code will go into force only after a new Land Code is adopted by the State Duma and promulgated by the President.²¹ Part Two was adopted by the State Duma on December 22, 1995, signed on January 26, 1996, and went into force on March 1, 1996.²² It is anticipated that Part Three will be adopted sometime during the fourth quarter of 1998. Soon thereafter it will be signed and will go into effect sometime during the first quarter of 1999. When the third part of the Civil Code goes on the books, all three complementary parts will be consolidated into one Code to be known simply as the Civil Code of the Russian Federation, without the need for further reference to the three individual parts. The decision to adopt the Russian Civil Code in three installments was dictated by the fact that the Model Civil Code for the CIS republics, which served as the working model for the drafters of the Civil Code, was drafted in three waves. The contents of the three parts of the Russian Civil Code parallel those of the corresponding parts of the Model Civil Code.

The same factors that influenced the decision by the drafters of the Russian Civil Code to phase in the Civil Code in three installments also influenced the decision by the drafters of the Kazak Civil Code to adopt their Civil Code in more than one installment. However, unlike the situation in Russia, the Kazak Civil Code will be adopted in two parts. Part One of the Kazak Civil Code was adopted by the Supreme Soviet of the Republic of Kazakstan on December 27, 1994 and promulgated by the President of the Republic of Kazakstan on the same day. It went into effect on March 1, 1995. It is anticipated that Part Two of the Civil Code of Kazakstan will be adopted by parliament sometime during the fourth quarter of 1998. It will be signed into law

21 See Article 13 of the Law of the Russian Federation of November 30, 1994, No. 52-FZ "On the Entry into Force of First Part of the Civil Code of the Russian Federation."

22 See W.E. BUTLER & MARYANN E. GASHI-BUTLER, INTRODUCTION TO THE CIVIL CODE OF THE RUSSIAN FEDERATION (W.E. Butler trans., 1997).

soon thereafter and go into effect sometime during the first quarter of 1999.

Following the example of the civil codes of Holland, Italy, and Switzerland, the civil codes of Russia and Kazakstan unify in one omnibus civil code two traditional continental European codes—the civil and the commercial codes. In the language of Article 2(1) of the Russian Civil Code, “Civil legislation shall regulate relations between persons engaged in entrepreneurial activities or participating in such activities.”²³ The essence of this provision of the Russian Civil Code is embodied in Article 1(1) of the Civil Code of Kazakstan.

Part One of the Russian Civil Code is divided into sections, subsections, chapters, paragraphs, sub-paragraphs, and articles. There are three sections, seven subsections, twenty-nine chapters, and 453 articles. Section 1 contains five subsections; Section 2 does not have any subsections; Section 3 has two subsections. Unlike the 1964 Russian Civil Code, which denominated the section of the Code dealing with general rules as the “General Part” and the section dealing with the specific rules as the “Special Part,” the 1994 Russian Civil Code does not use the designations “General Part” and “Special Part.” Rather, the segment of the Code which corresponds to the “General Part” of the 1964 Civil Code is designated in the 1994 Civil Code simply as “Section One: General Principles.” Accordingly, Sections 2 and 3 of the 1994 Civil Code correspond to the segments of the 1964 Civil Code which are designated as the “Special Part.”

The internal division of Part One of the Kazak Civil Code is somewhat simpler than that of the Russian Civil Code—there are no subsections. Thus, Part One of the Kazak Civil Code is divided into sections, paragraphs, sub-paragraphs, chapters, and articles. It contains twenty-four chapters and 405 articles; five chapters and forty-eight articles less than Part One of the Russian Civil Code. The Kazak Civil Code is able to achieve this economy through the consolidation of several individual articles in the Russian Civil Code into mega-articles, as well as through the consolidation of several sections in the Russian Civil Code into mega-sections. In other words, notwithstanding the smaller number of sections, chapters and articles in Part One of the Kazak Civil Code in comparison with the total number of sections, chapters and articles in the Russian Civil Code, a juxtaposition of the provisions of the two codes indicates that the coverage of both codes is substantially the same. (For reasons which defy logic, the entire Part One of the Kazak Civil Code, with its twenty-four chapters

23 GK RF art. 2(1).

and 405 articles, is denominated as the "General Part" and the forthcoming Part Two will be denominated as the "Special Part.")

A close examination of the structural patterns of both civil codes leads me to the conclusion that the approach adopted by the Russian Civil Code is preferable to the consolidation method employed by the Kazak Civil Code. The Russian approach facilitates better reading, clearer presentation and easier identification of the issues. For example, the concept of business custom is spelled out quite succinctly in Article 5 of the Russian Civil Code. The same notion is tucked away in a cryptic formulation in Article 3(4) of the Kazak Civil Code.

Part Two of the Russian Civil Code is taken up entirely by Section 4, which is divided into chapters (30–60), paragraphs, sub-paragraphs and articles (454–1109). At the time of this writing, Part Two of the Civil Code of Kazakstan had been adopted by parliament, vetoed by the President, and remanded to parliament for reconsideration. The internal divisions of the final draft of Part Two, which is currently under reconsideration, mimic those of Part One of the Kazak Civil Code.

It follows from the foregoing discussion that the internal divisions of the Civil Code of Kazakstan do not entirely coincide with those of the Russian Civil Code. This asymmetry in the structural configuration of the two civil codes does not, however, result in any difference in the scope of their substantive coverage.

B. The Subject Matter Covered By the Two Civil Codes

As I already noted in Part I, the breadth of the Russian Civil Code of 1994 is unprecedented in the history of continental European civil codes. The Russian Civil Code practically subsumes all aspects of private law, with a few notable exceptions. This breadth is attributable, in part, to its merging both the traditional continental European civil and commercial codes. But, in doing so, it goes far beyond the scope of its European prototypes, which also merged the traditional civil and commercial codes.

Part One of the Russian Civil Code is divided into three sections that are denominated respectively as "General Provisions," "The Right of Ownership and Other Rights to a Thing," and "General Part of the Law of Obligations." Section 1 is in turn divided into five sub-sections that are entitled respectively as "Basic Provisions," "Persons" (which includes the law of natural persons and the law of legal entities), "Objects of Civil Rights," "Transactions and Representation," and "Periods, Statute of Limitations." Section 3 is divided into two subsections, which are called as "General Provisions on Obligations" and "General

Provisions on Contract” respectively. Chapter 23, which is structurally a part of Section 3, Subsection 1 of the Civil Code, is devoted entirely to the law of secured transactions. It deals with seven different devices for securing the performance of obligations. Article 256 of Chapter 16, which deals with “Common Ownership,” sets out specific provisions to the law of community property. Section 2 includes foundation principles of the law of land ownership in Chapter 17, Articles 260–87, and housing law in Chapter 18, Articles 288–91.

Section 4, Part Two, in Articles 454–1109 of the Code is devoted to the law of nominate obligations. In addition to covering the law of *Negotiorum Gestio* (actions without authority) (Chapter 50), Unjust Enrichment (Chapter 60), Tort (Chapter 59) and Unilateral Obligations (*i.e.*, Public Promise of an Award in Chapter 56 and Public Competition in Chapter 57), Section 4 regulates twenty-six nominate contracts, that is, Sales (Chapter 30), Barter (Chapter 31), Gift (Chapter 32), Annuity and Life Estate (Chapter 33), Lease (Chapter 34), Lease of Residential Accommodation (Chapter 35), Gratuitous Use (Chapter 36), Independent Contractor Work (Chapter 37), Performance of Research, Development and Process Engineering Work (Chapter 38), Compensable Services (Chapter 39), Carriage (Chapter 40), Forwarding (Chapter 41), Loan and Credit (Chapter 42), Financing Against Assignment of a Monetary Claim (Chapter 43), Bank Deposit (Chapter 44), Bank Account (Chapter 45), Settlement of Account (Chapter 46), Agency (Chapter 49), Commission Agency (Chapter 51), Agency Service (Chapter 52), Trust Administration of Property (Chapter 53), Franchise (Chapter 54), Simple Partnership (Chapter 55), and Gambling (Chapter 58). The rule here is that the general principles of the law of obligations in Part One are subject to modification with regard to each nominate obligation by the rules in Part Two of the Civil Code.

Following the structure of Part Three of the Model Civil Code for the CIS republics, the Draft of Part Three of the Russian Civil Code contains three sections that are denominated respectively as “Intellectual Property” (Section 5), “Inheritance” (Section 6), and “Private International Law” (Section 7).²⁴

The range of legal relations that are regulated by the 1994 Russian Civil Code is set forth in the three-paragraph text of Article 2.

24 The intellectual property law chapter in Part Three (Draft) of the new Russian Civil Code builds on the existing Russian legislation on intellectual property. For a review of the existing intellectual property law of the Russian Federation, see Christopher Osakwe, *The Greening of Russian Law of Intellectual Property: Translations and an Introductory Commentary*, 32 I.L.M. 1614 (1993).

The provisions of this Article indicate that the Code governs all relations regulated by the individual branches of Russian law, denominated as follows: property, obligations (including contract, tort, unilateral obligation, unjust enrichment, and *negotiorum gestio*), community property, succession enterprise organization, secured transactions, banking, private international law (conflicts of law), insurance, trust administration of property, securities regulation, bankruptcy, antitrust, unfair trade practices, consumer protection, commercial advertising, and the regulation of inter-state commerce. The one traditional component of continental European civil codes that is left out of the Russian Civil Code is family law. Also left out of the Civil Code are property relations that are regulated by: administrative law, tax law, foreign investment law, law of privatization, land law, housing law, transportation law, and mineral law. However, if a foreign investment enterprise or a privatized enterprise participates in any of the civil law relations enumerated in Article 2 of the Civil Code, its activities are subject to regulation by the Code. Even though land law, housing law, mineral law, transportation law, and family law are regulated separately by their respective codes, the Civil Code contains the core principles of the law of ownership of land (Chapter 17), law of ownership of residential accommodation (Chapter 18), law governing the lease of residential accommodation (Chapter 35), law of ownership of minerals (Chapter 17), law governing the lease of transport vehicles (Chapter 34), and certain provisions of family law (such as emancipation in Article 27, tutorship and guardianship in Articles 31–40, registration of the acts of civil status in Article 47, and common ownership of spouses in Article 256). A strict reading of the supremacy clause in Article 3 of the Code suggests that the provisions of these other codes dealing with civil law relations must conform with the relevant outcome-determinative provisions of the Code.

In other words, in addition to regulating eighteen specific branches of the law (almost the entire spectrum of private law), the Civil Code intersects quite directly with, as well as dictates, the contents of the civil law provisions of five other codes: land code, mineral code, housing code, transportation code, and family code. Judged by the breadth of its coverage, the 1994 Code yields only to the Russian Constitution of 1993. In fact, it touches the lives of ordinary Russian citizens more directly than does the 1993 Constitution. A survey of the opinion of ordinary Muscovites that was undertaken by this author during the three-week period from June 9 to June 30, 1997, yielded an interesting result: of the 350 randomly selected persons that I interviewed, eighty percent were more knowledgeable about the provisions of the Civil Code than they were of the Russian Constitution of 1993;

seventy-five percent placed more faith in the Civil Code than they did in the Constitution as the guarantor of the new economic system of the country; and ninety-five percent thought that the Civil Code's decision to introduce a separate civil cause of action for defamation (in addition to the Criminal Code's provisions on defamatory actions) and for compensation for moral harm was a very good idea. This survey indicated to me that two ingredients of legal culture (legal literacy among the ordinary citizens and faith in the law by the average citizen) are beginning to take root in post-Soviet Russia.²⁵

Even though the 1994 Civil Code brings under one umbrella eighteen individual branches of the law, it does not regulate all aspects of these eighteen civil law relations in great detail. In most instances, the Code merely articulates the general principles of the law, leaving the pedestrian details to the civil legislations that are subordinated to the Code. For example, the skeleton of the law of bankruptcy is contained in Articles 57 through 65 of the Civil Code, but the flesh of this law is supplied in a separate, more detailed law on bankruptcy. Similarly, the law governing the formation and operation of joint stock companies is sketched out in Articles 66–68 and 96–104 of the Code, but a detailed regulation of the minute aspects of the life of a joint stock company is left to the more elaborate law on joint stock companies. Another example of the symbiotic relationship between the Civil Code and the ancillary civil legislation dealing with civil law relations may be found in the law governing the registration of business organizations. Article 51 of the Code simply stipulates that all legal entities (commercial as well as non-commercial) are subject to state registration in a justice agency before they commence their operations. The detailed regulation of the registration requirements and process is left to a subordinate law on the registration of legal entities. Whereas the Russian Civil Code tends to defer detailed regulation of specific aspects of civil law relations to ancillary legislations that are subordinated to the Code, the Kazak Civil Code has the unfortunate tendency to intrude into the territory of ancillary legislations by incorporating minute details that ideally ought to be left to ancillary regulations.²⁶

In this sense, the Russian Civil Code is to Russian civil law what the head is to the human body: it directs, controls, coordinates, and harmonizes the centripetal movement of the enormous body of rules

25 For my discussion of the absence of legal culture in Russia and Kazakstan, see *infra* Part VII.A.

26 For my discussion of this difference in the styles of the Russian and Kazak civil codes, see *infra* Part VII.B.

referred to generically as *grazhdanskoe zakonodatelstvo* (civil legislation). Article 3 of the Civil Code uses the term "civil legislation" inclusively to refer to all "laws" that regulate civil law relations, including the Civil Code and other statutes. Together, these legal rules form a huge pyramid at the top of which majestically stands the Civil Code. Other components of this pyramidal formation include, in addition to the Civil Code and other ancillary civil legislations, presidential decrees, rules and regulations promulgated by the respective executive agencies, generally accepted business custom, and binding rules of international law.²⁷

There is no limit as to how many presidential decrees or executive regulations may be promulgated to regulate the various aspects of civil law relations in the Russian Federation. The Civil Code leaves that determination to the President and to the respective executive agencies. For example, it is left to the discretion of the Central Bank of Russia to decide how many regulations it would need to issue in order to regulate the different facets of banking operations. A subtle but very important point in Article 2 of the Civil Code relates to the authority of the President of the Russian Federation to regulate civil law relations by decree. The powers of the President of the Russian Federation are enumerated in Article 121(1) to (11) of the Russian Constitution. As long as a presidential decree does not contradict the Code or any other federal civil legislation, the President will be acting within his authority if he promulgates a decree on any matter that falls within his constitutional jurisdiction. However, the Civil Code does preemptively stipulate aspects of civil law relations which the President may not regulate by decree and which can be regulated only by the Civil Code or other federal civil legislations. One example of such a preemptive clause may be found in Article 445(2) of the Code. According to this provision, the principle of freedom of contract, which is enshrined in Articles 1 and 421 of the Code, may be modified only by a specific provision of the Code itself or by another federal civil legislation, not by a Presidential decree or executive regulation. This means that the Civil Code has successfully arrogated to itself the authority to define the range of civil law relations which the President cannot constitutionally regulate. In itself, this rule has the authority of a constitutional law.

In addition to presidential decrees and executive regulations, a host of ancillary legislations is needed to back up the Civil Code. The Code itself specifically calls for the enactment of twenty-nine "neces-

²⁷ The relationship between the Civil Code and international law is discussed *infra* this Part.

sary and proper” legislations to flesh out the majestic generalities of the Code. The twenty-nine subordinate statutes that are mandated by the Civil Code are laws on:

1. licensing
2. state registration of business organizations (including legal entities, sole proprietorships, branch offices, and representation offices)
3. bankruptcy
4. joint stock companies
5. limited liability companies
6. production cooperatives
7. state and municipal unitarian enterprises
8. immunity of the state and of its property (sovereign immunity)
9. registration of immovable property and transactions connected with it
10. currency regulation and currency control
11. foreign currency transactions in the territory of the Russian Federation
12. mortgages
13. pawnshops
14. consumer cooperatives
15. social and religious organizations
16. state and private non-profit institutions
17. legal status of foreign citizens, stateless persons, and foreign legal entities
18. registration of acts of civil status
19. administration of the property of a ward
20. registration of a firm name
21. commercial secrets
22. protection of the rights of consumers
23. securities
24. public contracts
25. advertising
26. bills of exchange and promissory notes
27. partnerships in residential apartments (condominiums)
28. competition and restrictive trade practices
29. public works (work for government needs).

Additionally, some of the nominate contracts (such as contracts for the supply of goods for government needs, forwarding, and individual types of insurance) in Part Two of the Civil Code will need further elaboration in ancillary statutes.. It is also anticipated that Section 5 of Part Three of the Code (dealing with the law of intellectual prop-

erty) may call for ancillary statutes to spell out the details of the individual forms of intellectual property.

Some of the ancillary civil legislations listed above predate the Code; they had already been promulgated prior to its adoption but had to be amended to conform with it. Most will be promulgated at the same time that the Code is being put in place, while others will be enacted after the phased-in adoption is completed. Regardless of the sequence in which the component parts of this legal pyramid are put in place, a cardinal rule in Article 3 of the Civil Code is that if the provision of any other civil legislation is in conflict with a peremptory norm of the Code, the former shall yield to the Code. In this sense, the Civil Code of Russia has a quasi-constitutional status within the Russian legal system.

Article 3(1) of the Civil Code recites Article 71(m) of the Russian Constitution of 1993, according to which the enactment of civil legislations shall fall within the exclusive jurisdiction of the federal Government. This means that the eighty-nine "subjects" (states) of the Russian Federation are constitutionally precluded from enacting civil legislations in any form or shape. As a direct result of this constitutional rule, there is only one civil code in Russia, and all the other civil legislations in the country exist only at the federal level. This may seem odd to someone schooled in the American federal system. But, it should be noted, parenthetically, that Russia is not the only modern federal state that has just one national civil code. The same situation exists, for example, in Germany, a federal republic with one national civil and commercial code. However, the combined coverage (scope) of the German civil and commercial codes pales by comparison with that of the unified Russian Civil Code.

If we transpose this Russian constitutional formula into the American legal scene, the fifty American states would be precluded from enacting laws governing any of the subject matters enumerated in Article 2 of the Russian Civil Code. The Tenth Amendment to the United States Constitution would not permit such concentration of law-making powers in the U.S. federal government. The power of the Russian federal government to enact civil legislation, however, is limited by Article 7 of the Code, according to which generally accepted principles and norms of international law, as well as treaties of the Russian Federation, are regarded as integral parts of Russian law. Unless otherwise indicated by the provisions of an international treaty of the Russian Federation, Article 7(2) provides that rules of such an international treaty are directly applicable in the Russian Federation. In the event of a conflict between an international treaty of the Rus-

sian Federation and a provision of the Russian Civil Code, Article 7(2) also directs that the international treaty shall prevail.

Against the backdrop of the foregoing discussion, the hierarchy of the sources of regulation of civil law relations in the Russian Federation (in addition, of course, to the Constitution of the Russian Federation, which is the supreme law of the land) is as follows: the supreme domestic source is the Civil Code, followed by other federal civil legislations, a presidential decree, executive regulations, and finally business custom. The Civil Code yields only to binding norms of international law.

The range of subject matter covered in the Civil Code of Kazakhstan is analogous to that of the Russian Civil Code. This means that the Kazak Civil Code, like its Russian counterpart, regulates eighteen different branches of the law, calls for the enactment of twenty-nine subordinate legislations to flesh out the general rules embodied in the Civil Code itself, and dictates the contents of the civil law provisions of five other codes, such as the land code, housing code (in Kazakhstan the housing code is called "Law on Housing Relations"), mineral code, transportation code (Kazakhstan does not have one omnibus transportation code, but instead has several sectoral codes or laws regulating different types of transportation), and family code.

Given the breadth and constitutional status of these two civil codes, the question that naturally arises is: Are these two civil codes really civil codes? At first glance, one would be tempted to say that the Russian Civil Code of 1994 is neither a "code" nor is it "civil." To answer the question, let us examine the attributes of a continental European civil or commercial code. Ideally, a civil or commercial code should have the following six attributes: (1) Systematization (all of its provisions should be carefully thought out, clearly restated, and systematically arranged in order to form one continuum); (2) Common subject matter (all the topics covered must be sufficiently interconnected in order to form one unified theme); (3) Interconnection and mutual dependence among the respective sections and chapters of the code (in order to form a unified whole, all of its chapters shall be mutually interdependent, without allowing repetitious coverage); (4) Sequential numbering of the articles from the beginning to the end (the numbering of the provisions must flow sequentially from the first article in the first section to the last article in the last section); (5) Official adoption and promulgation (it must be officially legislated and not merely a private compilation); and (6) Equality with all other laws dealing with the same subject matter (it does not enjoy a superior status *vis-à-vis* other laws and can be superseded and modified by a subsequent organic legislation dealing with the same subject matter).

The Russian and Kazak Civil Codes clearly meet five of the six attributes enumerated above—the provisions are restated systematically, there is a common subject matter, the chapters are sequentially arranged and are mutually interdependent without being repetitious, the articles are numbered sequentially from the beginning to the end, and the codes were officially promulgated. These two codes, however, fail to meet the sixth attribute of a continental European civil or commercial code, by virtue of their supremacy status vis-à-vis other legislations dealing with the same subject matter. As a result of the foregoing analysis, one could say that the Russian Civil Code of 1994 is not entirely “civil” in the sense that it embraces civil and commercial laws. The Code, however, successfully weaves the rules of these two branches of the law into a common theme and could be deemed to have one common subject matter. The fact that the Code enjoys a quasi-constitutional status does not make it less of a Code. In short, it is a civil code, albeit a civil code *sui generis*. (Incidentally, would the UCC qualify as a “code” under the litmus test set forth in the foregoing paragraph?)

V. THE GENESIS OF THE CODES: THE SAGA OF TWO TEST TUBE BABIES

Three events precipitated the origin of these two codes. Respectively, the events are the role played by international donor organizations as catalysts for the chain of events, the outside-the-womb conception and in-womb gestation of the codes, and the birthing of the codes. The making of the two codes followed a common pattern: funding for both code projects came from virtually the same deep pockets, and the drafting of both codes was handled by two separate teams with substantial overlap in membership. But, the birthing process (or the adoption by the parliament) of the Russian Civil Code was quite violent, while that of the Kazak Civil Code was virtually frictionless. Let us begin our analysis with an examination of the genesis of the Russian Civil Code.

A. *The Russian Civil Code*

1. Funding of the Russian Civil Code Reform Project: International Organizations as Catalysts for Law Reform

In the making of the Russian Civil Code of 1994, the role of international donor organizations was essentially that of catalysts for reform; they precipitated the entire law reform process without being involved in the consequences. It goes without saying that any good

idea will never get off the drawing board if funding is not available to transform it into reality. In the case of the Russian Civil Code, it became quite clear at the outset that the Russian government would not be able to allocate all the funds that would be needed to launch and successfully complete a major civil code reform project. To make up the difference between the money that could be expected from the government and the amount that would be actually needed, two international donor organizations chipped in some money. The result of this collaborative effort is that funding for the Russian Civil Code reform project was provided in part by the World Bank in the form of a repayable law reform credit granted to the Russian government. This money was used to fund the work of the drafters of both the Russian Civil Code and the Model Civil Code for the CIS republics.

In addition to World Bank funding, financing for the Civil Code project was generously provided by the United States Agency for International Development (USAID) in the form of making international consultants available to the drafters of the Code. USAID technical assistance in this project was in the form of a non-repayable benefaction to the Russian law reform process from the government of the United States (acting through USAID), which recruited, funded and sent international experts to Russia to advise the Russian drafters of the Code. The purpose of USAID funding was entirely altruistic. The aim was to assist Russia's successful transition to a market economy by helping to put in place a legal infrastructure that would facilitate the eventual integration of post-Soviet Russia into the global economy. If there is any selfish intention behind USAID's technical assistance to the drafters of the Russian Civil Code of 1994, it would be the desire to make post-Soviet Russia a safe place for American companies to do business by helping to modernize the commercial laws of Russia and preparing Russia for accession to the World Trade Organization. USAID's assistance to the Russian Civil Code reform project is only one component of USAID's overall assistance in the modernization of the commercial laws of post-Soviet Russia.

Some funding for the reform project was also provided by the Russian government in the form of budgetary allocation to support the work of the Russian Center for Private Law attached to the Executive Office of the President of the Russian Federation. It is difficult to say with any precision the respective portions of the total budget for the Civil Code reform project that was funded by these three sources. What can be said, however, with some degree of accuracy is that the World Bank's assistance was particularly instrumental in the drafting of the Model Civil Code for the CIS republics, as well as in the drafting of Part One of the Civil Code. At the conclusion of these critical

phases of the overall civil code reform process, the World Bank tended to fade into the background (typically because the term of the relevant World Bank loan had expired), while yielding the leading role in the law reform process to USAID technical assistance.

2. The Drafting of the Russian Civil Code: Conception and Gestation of the Code

In modern medical terminology, the Russian Civil Code of 1994 was conceived by *in vitro* fertilization; that is, in a test tube outside the womb of the mother. The fertilized egg was later returned to the mother's womb where it was carried to full term and successfully delivered by cesarean section. In other words, the conception of the Code is the direct result of successful genetic engineering. The *in vitro* fertilization was the result of the fusion of the five sources discussed in Part III.A above. In this medical analogy, the role of the test tube was played by the Center for Russian and East European Legal Studies of the University of Leyden in Holland; the role of the mother's womb was perfectly handled by the Russian Center for Private Law attached to the Executive Office of the President of the Russian Federation; the mother is naturally the Russian Federation; the three trimesters of the gestation of the code were ably directed by an international team of genetic engineers drawn from Russia, Holland, and the United States; the maternity hospital was the floor of the State Duma of the Federal Assembly of the Russian Federation; and the chief obstetrician in charge of the cesarean section delivery was President Boris Yeltsin.

The actual drafting of the Russian Civil Code was a continuing process that included several phases: initial conceptualization, preparation of working drafts, discussion of the working drafts by the Civil Code Working Group, consultation with international consultants on the working drafts, and "thinking sessions" at which the drafters collectively reflected over the several drafts. The result of this deliberative process was the final draft that was officially submitted to parliament by the government of the Russian Federation to commence the tedious legislative process. Several of the "thinking sessions" of the drafters of the Civil Code were held in Leyden, Holland, at the Center for Russian and East European Legal Studies of the University of Leyden. The entire process was orchestrated and ably directed by the Russian Center for Private Law in Moscow, which served as the headquarters for the civil code drafting project. The Civil Code Working Group was chaired by Professor Alexander Lvovich Makovskii (incidentally, Professor Makovskii was also the principal architect of the 1991 amendments to the FPCivL, which constituted one of the

building blocks for the 1994 Civil Code) and included, among others, S.S. Alekseev, G.E. Avilov, M.I. Braginskii, Iu.K. Kalmikov, S.A. Khokhlov, A.S. Komarov, O.M. Kozyr, M.A. Matiukov, E.A. Sukhanov, V.V. Vitrianskii, V.F. Iakovlev, and G.D. Golubov. The Civil Code's Working Group was advised by an equally stellar lineup of American (notably Professors James J. White, Robert S. Summers, and Peter B. Maggs) and Dutch experts.

3. The Legislative Process: The Birthing of the Russian Civil Code

The final draft of the Civil Code that was produced by the drafters reflected an economic philosophy of free enterprise. The draft Code embodied the law reforms that were envisioned by President Yeltsin who, for all practical purposes, should be regarded as the "father" of the Code. Unfortunately, anti-Yeltsin political forces (consisting mainly of a coalition of communist, procommunist, and nationalist deputies) were heavily represented in the Russian federal parliament, and they made it known even before the draft Civil Code was delivered to parliament that they were opposed to many of its free market principles. At this point, it fell on President Yeltsin to use all of his political skills to get the draft Code through the legislative branch of the Russian federal government. During the legislative debates over the draft Code, the President lost a few battles, but won others. Anti-free market amendments were inserted into the draft Civil Code by members of the State Duma during the floor debates. President Yeltsin's floor managers for the bill successfully fought against many of such subversive amendments, but had to yield on others. What emerged from the crucible of the Russian federal parliament was a Code that Yeltsin felt he could live with.

When the history of the 1994 Russian Civil Code is written, it will note the astonishing fact that the Council of the Federation (the upper house of the Russian federal parliament) did not give its blessings to the Code: it rejected Part One (but did not vote to reject the Code within the time limit required by law and thus did not prevent the President from signing it into law), and did not bother to vote on Part Two. In other words, the Council of the Federation "approved" Part One of the Civil Code by its failure to reject it within the technically permissible time limit. Thus, this second most important federal law (in importance, the Civil Code yields only to the 1993 Russian Constitution) in post-Soviet Russia went on the books without the approval of both houses of the Russian federal parliament. This curiosity can only be explained by the enigmatic rules of the Russian Constitution, which draws a fine distinction between a "federal constitutional law"

and a "federal law." Article 108 of the Constitution requires the passage of a federal constitutional law by a vote of at least three quarters of the members of the Council of the Federation (the upper house of the Russian parliament), and of at least two-thirds of the members of the State Duma (the lower house). By contrast, Article 105 of the Constitution requires the passage of a federal law by a simple majority vote of the members of the State Duma. Within five days of the adoption of the bill by the State Duma, it shall be sent to the Council of the Federation for its approval. Upon receipt of the bill, the Council of the Federation has fourteen days during which it may approve the bill by a simple majority vote. If the Council of the Federation fails to act on the bill during this 14-day period, its non-action shall be considered as an approval of the bill. But, if it votes to reject the bill during this time frame, the bill shall be returned to the State Duma for its reconsideration. If the State Duma by a vote of at least two-thirds of its members re-adopts the bill in its original form, it shall be deemed to have passed over the objection of the Council of the Federation. The Civil Code, under the definition stipulated in Article 109(2) of the Constitution, is a federal law, not a federal constitutional law. As such, it did not really need to be approved by the upper house of the Russian federal parliament.

B. *The Civil Code of Kazakhstan*

Subject to some modifications, everything that has been said in the foregoing section about the genesis of the Russian Civil Code applies *mutatis mutandis* to the origins of the Civil Code of Kazakhstan. As was the case in the situation of the Russian Civil Code, the role of the test tube was played by the Center for Russian and East European Legal Studies of the University of Leyden in Holland. The drafters of the Kazak Civil Code held several "thinking sessions" in Leyden. The role of the mother's womb was initially assigned to the Ministry of Justice of the Republic of Kazakhstan. At some point during the Code's gestation period, the mother's womb was moved to the Office of the Deputy Prime Minister for Law Reform. When the Deputy Prime Minister for Law Reform left government in 1996 to return to academia, the mother's womb was again returned to the Ministry of Justice. The shift in the location of the mother's womb is attributable to the fact that the individual who guided the development of Part One of the Civil Code from conception to birth and the development of Part Two of the Civil Code from conception through the end of the second trimester of gestation was the Minister of Justice, who was subsequently promoted in 1995 to the position of Deputy Prime Minister

for Law Reform in the Office of the Prime Minister. After the birth of Part One of the Code, and somewhere during the second trimester of the embryonic development of Part Two, this individual left government service and returned to academia, from which he had been on academic leave to serve in government. The individual is Professor Nagashbai Amangalevich Shaikenov, who for all practical purposes should be regarded as the "Father of the Civil Code of Kazakstan of 1994." When he left government service, his two successors as Minister of Justice between 1995 and 1997, Konstantin Kolpakov and Baurzhan Mukhamedzhanov, successfully guided Part Two of the Civil Code to its natural birth, using the blueprints that had been put together by the departing Professor N.A. Shaikenov.

The mother of the Kazak Civil Code is naturally the Republic of Kazakstan. The entire three trimesters of the gestation of the Code was guided by a team of genetic engineers drawn from Kazakstan, Holland, Russia, and the United States. In other words, Russian consultants assisted the international team of advisors who guided the drafters of the Kazak Civil Code. The maternity hospital was the rubber-stamp national parliament, called the Supreme Soviet of the Republic of Kazakstan. It should be noted in this context that the legislative debate over the draft of the First Part of the Code was not anything close to the bloody fight that took place on the floor of the State Duma of the Federal Assembly of the Russian Federation when the First Part of the Russian Civil Code was adopted. Thus, the birth of Part One of the Kazak Civil Code was by natural birth, not by cesarean section as was the case during the birth of the First Part of the Russian Civil Code. Moreover, funding for the drafting of the Kazak Civil Code was also provided by a World Bank law reform repayable credit to the government of the Republic of Kazakstan, by USAID, and by budget allocation from the government of the Republic of Kazakstan.

The Kazak Civil Code Working Group consisted of several local experts. But, the most influential of the local drafters of this Code were Iu.G. Basin, M.K. Suleimenov, A.G. Didenko, and A.I. Khudiakov—all are prominent civilists. The first three are professors of civil law at the Kazak State Law University (the Rector of which incidentally became Professor N.A. Shaikenov after he left government service). The fourth is a professor of civil law on the law faculty of the Kazak State National University.

When the history of Part One of the 1994 Civil Code of Kazakstan is written, it will note the fact that the Code was "illegitimate" at birth, that the doubts about the Code's constitutionality lingered for more than two months after the Code was first promulgated, but that a sub-

sequent presidential decree ratified the otherwise unconstitutional Code and, thus, retroactively restored legitimacy to the Code. The following is the historical setting for the Code's illegitimate birth. On March 6, 1995, the Constitutional Court of the Republic of Kazakstan held that the parliamentary elections that took place on March 7, 1994 had several irregularities. The Constitutional Court, however, did not void the elections. But, on the basis of the Court's decision, President Nursultan Nazarbaev issued a decree on March 11, 1995, dissolving the parliament that was elected on March 7, 1994. The President's March 11, 1995 decree went on to say that all laws that were enacted by the illegitimate parliament that was elected on March 7, 1994 were null and void, unless they were re-enacted by a decree of the President. On March 23, 1995, President Nazarbaev issued a new decree entitled "On Acts of the Supreme Soviet of Republic of Kazakstan." This latter decree re-enacted many of the laws that were adopted by the now-dissolved national parliament, including the 1994 Code. In short, on March 11, 1995, the sun set on the parliament that on December 27, 1994 had enacted Part One of the Code. Because the dissolution of this parliament on March 11, 1995 was made retroactive to March 7, 1994, all laws that were passed by this illegitimate parliament were technically wiped off the books. However, all clouds over the legitimacy of Part One of the Code were dissipated by the President's reenactment decree of March 23, 1995. At the time of this writing, Part One of the Civil Code of Kazakstan seems to have successfully recovered from any bruises that it may have suffered as a result of its illegitimate birth. It does continue to suffer, however, from a congenital disease which is attributable in part to its Soviet socialist heritage and in part to the absence of a legal culture in post-soviet Kazakstan.

VI. THE ANATOMY OF THE CODES: A CLINICAL EXAMINATION OF SELECTED PROVISIONS OF THE CIVIL CODES OF RUSSIA AND KAZAKSTAN

This portion of my analysis will examine eight sections of the respective civil codes, that is, the sections dealing with the supremacy clause, the takings clause, the interstate commerce clause, the law of enterprise organization, secured transactions, tort, property, and contract. Acting together, these eight segments reveal two dominant features of these two civil codes—their quasi-constitutional status and their economic philosophy of free enterprise.²⁸

28 Unless otherwise indicated, all references in parenthesis in the sections below are reference to their respective civil codes.

A. *The Supremacy Clause*

1. Russia (Article 3)

The Russian Civil Code's supremacy clause bases its constitutionality not on any explicit language of the Constitution, but rather on the penumbras of Article 71 of the Russian Constitution. Quite clearly, the Civil Code's supremacy clause is an expansive interpretation of the formulary provisions of the Russian Constitution of 1993. A juxtaposition of the respective provisions of the Civil Code and the Constitution on this question will reveal that the Code's text represents a substantial stretching of the language in the Russian Constitution. Let us examine the evidence.

Under the Russian Constitution of 1993, the federal government has both exclusive and concurrent jurisdiction. The former covers matters that may be regulated only by the federal government, while the latter deals with questions that may be handled concurrently by the federal and state or local governments. The exclusive federal powers are enumerated in Article 71 of the Constitution, whereas the matters on which the federal government shares concurrent powers with the state and local governments are articulated in Article 72 of the Constitution. Without defining the term "civil legislation," Article 71(n) of the Constitution assigns the enactment of civil legislation to the exclusive jurisdiction of the Russian federal government.²⁹ Taking advantage of this deliberate vagueness of the Russian constitutional language, the Civil Code of 1994 in Article 3(1) recites the rule in Article 71(n) of the Russian Constitution, and proceeds in Article 3(2) to define "civil legislation" to include "the present Code and other federal laws adopted in accordance with it (hereinafter: laws) . . . regulating the relations specified in Article 2(1) and (2) of the present Code."³⁰ In Article 3(2), the Code proclaims that "the norms of civil law contained in other laws shall be consistent with the present Code."³¹ Article 3(3) of the Civil Code goes on to say that the relations specified in Articles 2(1) and (2) of the Civil Code may also be regulated by decrees of the President of the Russian Federation, but that all such presidential decrees shall be consistent with present Code and with other laws. Articles 3(4) and (7) of the Civil Code recognize the power of the Cabinet of Ministers and other executive agencies, acting within their jurisdiction, to promulgate the necessary and proper regulations designed to regulate various aspects of civil

29 KONST RF 1993.

30 GK RF art. 3(2).

31 *Id.*

law relations. All such executive regulations shall be consistent with the Code, other federal laws, and presidential decrees dealing with the same subject matter. Thus, according to Article 3(1)–(4) and Article 3(7), the term “civil legislation” is a generic term which includes the Civil Code itself, other federal laws, presidential decrees, and executive regulations dealing with any aspects of civil law relations enumerated in Article 2(1) and (2).

Then comes the language of Article 3(5), which states quite categorically that in the event of a conflict between the Civil Code and any of the other components of civil legislation, priority shall be given to the Code. To further restrict the power of the President and other executive agencies to regulate civil law relations, Article 3(6) of the Civil Code states that “the effect and application of the norms of civil law contained in the decrees of the President of the Russian Federation and the regulations of the Government of the Russian Federation (hereinafter, other legal acts) shall be governed by the rules of the present Chapter.”³² In other words, if a provision of the Code conflicts with another federal law (including a civil law provision of any other federal code), with a presidential decree, or with an executive regulation, regardless of which one of the conflicting legal acts is later in time, priority shall always and unconditionally be given to the Civil Code. This means, for example, that if a provision of the law on state registration of business organizations conflicts with a mandatory provision of the Code, the former shall yield to it. It also means that if the provisions of a decree of the President of the Russian Federation contradicts a peremptory norm of the Civil Code, the presidential decree must yield to the superior rule in the Code. For purposes of the supremacy clause in the Code, it does not make any difference whether or not the offending presidential decree was promulgated after the Code went into effect. The Civil Code’s supremacy clause recognizes neither the principle of *lex posterior derogat priori* nor the rule of *lex specialis derogat generali*. As far as the Code’s supremacy clause is concerned, the rule in all conflict situations is that the Civil Code derogates any other civil law provisions of any other laws that are irreconcilably in conflict with its peremptory norm. What is amazing about this rule of Article 3 of the Russian Civil Code is that it does not have any clear support in the Russian Constitution of 1993, but rather is founded only on the penumbras of Article 71. This rule substantially expands the authority of the Russian Civil Code beyond the original intention of the drafters of Article 71 of the Russian Constitution of 1993 and by so doing has practically transformed the Code into the

32 *Id.* art. 3(6).

unchallenged queen of Russian private law and the de facto economic constitution of post-Soviet Russia.

2. Kazakstan (Article 3)

With one qualification, the supremacy clause of Article 3 of the Russian Civil Code is replicated in Article 3 of the Civil Code of Kazakstan. The one exception is contained in Article 3(3) of the Kazak Civil Code. According to this Kazak exception, all provisions of the Code dealing with

[r]elations connected with the creation, reorganization, bankruptcy and liquidation of banks, control over the activities of banks and the audit of banks, licensing of individual types of banking operations shall be regulated by the present Code to the extent that the provisions of the Code are not in conflict with the banking legislations in effect.

Relations between banks and their clients as well as relations between bank clients through banks shall be regulated by civil legislation pursuant to the procedure set forth in paragraph 2 of this Article.³³

In other words, according to Article 3(3) of the Kazakstan Civil Code, the Code is superior to all the other components of civil legislation with the notable exception of banking legislation. The term "banking legislation" could be interpreted to include the law on banks and banking activities, the law on the National Bank of Kazakstan (NBK), the several necessary and proper regulations of the NBK designed to implement the banking laws of the country, and the provisions of the laws on bankruptcy, mortgage, licensing, state registration of business organizations, accounting, and audit that in any way relate to the creation, bankruptcy, liquidation, licensing, or audit of banks. This is a substantial dent in the supremacy clause of the Kazak Civil Code. Article 3(3) is a monument to the political authority of the NBK. In the Amendments of August 31, 1995, the NBK succeeded in convincing the parliament to exempt all banking legislation from the brooding domination of the Civil Code. However, in a counterattack, the civilists convinced lawmakers in the amendments of March 2, 1998, to return its regulation of certain banking relations to the original reach of the Civil Code's supremacy clause

33 *Id.* art. 3(4).

B. *The Takings Clause*

1. Russia (Article 242)

The takings clause in the Russian Civil Code is solidly grounded in the Russian Constitution of 1993, whose general provisions are fleshed out in the Civil Code. Article 35(1) of the Constitution recognizes the sanctity of private property. Article 35(3) spells out the due process that must be followed before private property can be subjected to forced taking for public use. The skeletal provisions of Article 35(1) and (3) of the Constitution are spelled out in the takings clause in Article 242 of the Code. The essence of the due process protections that are embodied in Article 242(1) of the Russian Civil Code may be reduced to the following core principles: private property may be taken for public use only if there is a compelling reason to do so; such compelling reasons include "natural disasters, wrecks, epidemics, episodic, and other circumstances of an extraordinary character";³⁴ the decision to take private property for public use is made by a state agency pursuant to a procedure established by law; the owner of the requisitioned private property is entitled to prompt, effective, and adequate compensation (even though the Code itself does not define the parameters of what constitutes "prompt" compensation, Article 35(3) of the Constitution suggests that compensation for requisitioned private property must be paid prior to the taking not after the taking); in order to determine the price to be paid to the owner of the requisitioned property, the property must be subject to an independent appraisal and the appraised amount must reflect the market value of the property; if the owner of the requisitioned property disagrees with the appraised amount of the property, he may challenge the appraisal in a court of law; upon expiration of the grounds for the requisition of private property, the owner of the property may petition a court of law to demand the return of any portion of the property that remains. In short, the takings clause in Article 242 of the Code embodies all of the due process protections that are found in the takings clause in the Fifth Amendment to the U.S. Constitution.

A remarkable aspect of the relationship between the takings clause in the Russian Constitution of 1993 and the Russian Civil Code of 1994 is that the Constitution merely sets forth the general principles of the governing law, but leaves the details to the Code. In other words, the majestic generalities of the Constitution find specific articulation in the Civil Code, which becomes the *de facto* economic constitution of Russia's new market system.

34 *Id.* art. 242(1).

2. Kazakstan (Article 253)

The language of the takings clause in Article 242 of the Russian Civil Code is replicated verbatim in Article 253 of the Kazak Civil Code.

C. The Interstate Commerce Clause

1. Russia (Article 1)

The Russian Civil Code's interstate commerce clause is an amplification of the skeletal provisions of the interstate commerce clause in the Russian Constitution of 1993. According to Article 65 of the Constitution, the Russian Federation is a federal state consisting of eighty-nine "subjects of the Federation" (states). Article 8 of the Constitution states that the entire Russian Federation constitutes one unified "economic space" (common market) and that goods, services, and capital shall move freely among the constituent subjects of this federal system. The interstate commerce clause in Article 8(1) of the Constitution is reproduced in Article 1(3) of the Code. In the language of the latter provision of the Civil Code, "goods, services and financial assets shall move freely throughout the entire territory of the Russian Federation."³⁵ Article 1(3) of the Code goes on to state that certain limitations on the free movement of goods, service and capital among the constituent subjects of the Russian Federation may be instituted by federal law if such restrictions are necessitated by compelling reasons, such as the need to ensure public safety, protect the life and health of persons, protect the environment, or safeguard cultural valuables. Here again, it is interesting to note that the Russian Constitution confines itself to merely stating the general principles of governing law, while leaving the detailed regulation of interstate commerce to the Civil Code.

2. Kazakstan (Article 2)

Unlike the Russian Federation, which is a federal state, Kazakstan is a unitary state consisting of fourteen oblasts (regions) and two cities of republican significance, Almaty and Akmola. In other words, the unitary state of Kazakstan consists of sixteen "subjects" (administrative subdivisions). Technically speaking, since the country is not a federal state and its sixteen administrative subdivisions are not sovereign units, Kazakstan does not have any need for an interstate commerce clause. As in any unitary state, the entire country constitutes one "eco-

35 *Id.* art. 1(3).

conomic space" (common market). Nevertheless, the text of Article 2(3) of the Kazak Civil Code reproduces verbatim the provisions of Article 1(3) of the Russian Civil Code. Is this perhaps a case of the drafters of the Kazak Civil Code blindly copying the Russian Civil Code without pausing to think whether the Kazak Code really needs to embody a peculiarly Russian provision of the Russian prototype? Otherwise, how would one explain the curious fact that the Civil Code of a unitary state contains an interstate commerce clause?

D. Law of Enterprise Organization

1. Russia (Articles 18, 23, 48-123)

The Russian Civil Code's law of enterprise organization³⁶ is embodied in Chapter 4 (Articles 48-123), as well as in Articles 18 and 23. According to this new law, business enterprises in the Russian Federation may be organized in any one of the following fifteen forms: general partnership, limited partnership, limited liability company, unlimited (additional) liability company, joint stock company of the open type, joint stock company of the closed type, subsidiary company, dependent company, production cooperative, state (federal, regional, and local government) enterprise, branch office of a Russian (resident) enterprise, branch office of a foreign (non-resident) enterprise, representation office of a Russian (resident) enterprise, representation office of a foreign (non-resident) enterprise, and sole proprietorship. Of these fifteen individual forms of enterprise organization under the 1994 Russia Civil Code, the first ten forms are treated as legal entities, and the last five are regarded as non-legal entities. Thus, the first striking feature of this Russian law is that it treats general partnerships and limited partnerships as legal entities, separate and distinct from their members. As such, under the Russian law of enterprise organization, a partnership (general as well as limited) can sue and be sued in its own name, is separately liable from its members, and is a taxable entity, separate and distinct from its members. Article 50 of the Code defines a business enterprise as one whose primary goal is to make profits. Under the existing law, membership in a joint stock company of the closed type as well as in a limited liability company is limited to fifty persons. The formation and operation of a partnership require the participation of at least two persons. By contrast, a company can be formed and/or operated

³⁶ For an examination of pre-1994 Russian law of enterprise organization, see Christopher Osakwe, *Russian Law of Enterprise Organization: Theory and Practice*, 3 RUSSIAN OIL & GAS GUIDE 2 (1994).

by only one person. The formation and/or operation of a production cooperative require(s) the participation of at least five persons. It should be noted in passing that in addition to the two types of commercial partnerships mentioned above, the Russian Civil Code in Articles 1041–54 recognizes what it calls “simple partnership” (*prostoe tovarishchestvo*) which is not a legal entity, but can engage in both commercial and noncommercial activities.

The general principles of the law of enterprise organization under the 1994 Russian Civil Code may be reduced to the following rules:

a. All forms of enterprise organization (legal entities as well as non-legal entities) are subject to state registration. A legal entity shall be deemed to be created starting from the time of its state registration (Article 51(2)), the legal capacity of a legal entity commences at the time of its state registration (Article 49(3)), and a sole proprietor may commence business activities only from the time he is registered with the state authorities as such (Article 23(1)). A new feature of this law is that it confers upon all commercial organizations, with the notable exception of state enterprises, general legal capacity rather than narrow (restrictive) legal capacity. This means that, as the sphere of activities of a particular commercial enterprise changes, it need not have to seek permission to change directions or expand its scope of activities.³⁷

b. A business enterprise may engage in any form of activity that is not specifically prohibited by law. The conduct of certain types of activities may require a license. In the latter case, a business enterprise may engage in such activities only after the requisite license has been obtained (Article 49(1) and (3)). The list of activities that require a license and the procedure for obtaining a business license shall be defined by the law on licensing.

c. The foundation documents of a legal entity shall be as follows: a partnership shall operate on the basis of a partnership agreement (foundation contract); a company shall operate on the basis of a charter as well as a foundation contract; a company that is formed by just one person shall not have a foundation contract (Article 52); a state enterprise shall operate only on the basis of a charter; the foundation document of a legal entity shall specify its name, place of location, and procedure for its management, in addition to other information that may be required by law for specific types of legal entities (Article

37 For additional discussion of this element of Article 49 of the Russian Civil Code, see O. I. SHILOKHOVOST ET AL., *GRAZHDANSKOE ZAKONODATELSTVO ROSSII* [THE CIVIL LEGISLATION OF RUSSIA] 27 (1996).

52(2)); and the name and location of a legal entity shall be subject to the rules set forth in Article 54 of the Code.

d. Branch and representation offices of legal entities shall not be considered legal entities. As such, liability for their activities shall be borne by the legal entity that created them. The scope of the authority of a branch or representation office shall be stipulated in the foundation documents of the legal entity which created it (Article 55).

e. Contributions to the property of a business partnership or company may be in the form of money, securities, other property or property rights, or other rights having a monetary value as set forth in Article 66(6).

f. With the exception of state enterprises, all legal entities shall meet their liability with all the property that belongs to them (Article 56(1)). The liability of state enterprises is subject to the rules set forth in Article 113(5), and in Articles 115 and 120 of the Civil Code.

g. Participants in a general partnership and general partners in a limited partnership may be individuals and/or commercial organizations (Article 66(4)); participants in companies and limited partners in limited partnerships may be individuals or legal entities (Article 66(2)); an individual may be a general partner in only one limited partnership (Article 82(3)); a general partner in a limited partnership may not be a participant in a general partnership (Article 82(3)).

h. Participants in a general partnership shall solidarily bear subsidiary liability with their property for the obligations of the partnership; a participant in a general partnership who is not a founder shall be equally liable, along with all the other participants, for the obligations arising prior to his joining the partnership; a participant who has withdrawn from a general partnership shall be liable for the obligations of the partnership arising up until the time of his withdrawal, on equal terms with the remaining participants for a period of two years from the day of approval of the report of activities of the partnership for the year in which he withdrew from the partnership; any agreement among the partners in a general partnership to limit or vary the rules of liability set forth above shall be void (Article 75).

i. Unless the foundation contract or agreement of the remaining partners otherwise provides, the withdrawal of the participant from a general partnership shall not constitute grounds for the dissolution of the partnership (Article 76(1)).

j. Management of the affairs of a limited partnership shall be carried out only by the general partners (Article 84(1)). Unless otherwise stipulated in the foundation contract, all partners in a general partnership shall have the right to participate in the management of the affairs of the general partnership (Article 71).

k. A limited partner in a limited partnership shall be liable for the obligations of the partnership only to the extent of his contribution to the property of the partnership (Article 82(1)).

l. General partnerships, limited partnerships, limited liability companies, and unlimited liability companies do not have the right to issue stocks (Article 66(7)).

m. The charter capital of a limited liability company (LLC) shall be divided into shares of definite sizes as defined in the foundation documents, and the liability of participants in a LLC for obligations of the enterprise shall be limited to the extent of their contribution to the property of the company (Article 87(1)).

n. The charter capital of a LLC shall be at least half paid by its participants at the time of the registration of the company; the remaining unpaid portion of the company's charter capital shall be subject to payment by its participants within the first year of the company's operation (Article 90(3)).

o. An unlimited liability company is similar in every respect to the LLC, except that the participants in an unlimited liability company shall bear solidary liability for its obligations with their property in equal multiple proportions to the value of their contributions to the property to the company (Article 95(1)).

p. A joint stock company (JSC) is a company whose charter capital is divided into a fixed number of shares. Participants in a JSC shall be liable for the obligations of the company only to the extent of the value of the company's shares belonging to them (Article 96(1)); shareholders who have not fully paid for their shares shall bear solidary liability for the obligations of the company only to the extent of the unpaid portion of the value of their shares in the company (Article 96(1)).

q. In an open JSC, the participants may freely transfer their shares in the company to other persons without the consent of the other shareholders in the company (Article 97(1)), and may freely conduct open subscription to the shares it has issued as well as sell such shares freely in accordance with the securities laws (Article 97(1)); the relative value of preferred stock in the overall volume of the charter capital of the company shall not exceed twenty-five percent (Article 102(1)); the highest governing body of the company shall be its general meeting of shareholders (Article 103(1)); if the number of shareholders in the company exceeds fifty, the company shall create a board of directors or supervisory council (Article 103(2)).

r. In a closed JSC, the shares are distributed only among its members or some other previously defined circle of persons (Article

97(2)); a closed JSC shall not have the right to conduct open subscription for the stocks it issues or by some other means offer them for purchase to an unlimited circle of persons (Article 97(2)); shareholders in a closed JSC shall have priority right to purchase shares sold by other shareholders in the company (Article 97(2)).

s. A subsidiary company is one in which another (parent) company or partnership, either by virtue of a predominant participation in its charter capital or by virtue of a contract, "has the capacity to determine the decisions made by such a company,"³⁸ and is not liable for the obligations of the parent company or partnership (Article 105(2)). Under this provision, a subsidiary company could be organized either in the form of a JSC or a LLC.

t. Subject to the following two exceptions, which are set forth in Article 105(2) and (3), a parent company is not liable for the obligations of the subsidiary company: First, the parent company or partnership which has the right to give the subsidiary company, including by contract with it, directives which are binding on it, shall bear solidary liability with the subsidiary company for transactions concluded by the latter in carrying out such directives. Second, in the event of the insolvency (bankruptcy) of the subsidiary company through the fault of the parent company (partnership), the latter shall bear subsidiary liability for its obligations.

u. According to Article 106(1), a dependent company is one in which the dominant company owns more than twenty percent of the voting shares (in the case of a JSC) or owns twenty percent of the charter capital (in the case of an LLC). This definition implicitly recognizes two types of dependent companies, a dependent joint stock company and a dependent limited liability company.

v. A production cooperative is defined in Article 107(1) as a voluntary association of individuals for the purpose of joint production or other economic activities based on their personal labor and other participation; the members of a production cooperative shall bear subsidiary liability for the obligations of the cooperative (Article 107(2)); the formation and/or operation of a production cooperative shall require the participation of at least five persons (Article 108(3)); a production cooperative shall not have the right to issue stocks (Article 109(3)); the administration of a production cooperative shall be entrusted to the general meeting of its members; but, if the number of participants in the cooperative exceeds fifty, a supervisory council shall be created to manage the affairs of the cooperative (Article 110(1)).

w. The ownership of the property held by a state enterprise shall continue to vest in the state; such property shall be indivisible and may not be apportioned into contributions (portions or shares) nor distributed among the members of the enterprise (Article 113); a state enterprise shall meet its obligations with all the property that belongs to it (Article 113(5)); a state enterprise shall not be liable for the obligations of the owner of the property held by it (Article 113(5)); state property may be held by a state enterprise either on the basis of the right of "economic management" of such property or the right of "operational administration" of such property (Articles 114 and 115); the owner of an enterprise based on the right of economic management shall not be liable for the obligations of the enterprise, subject to the exception specified in Article 56 (Article 114(8)); by contrast, the state shall bear subsidiary liability for the obligations of a state enterprise founded on the basis of the right of operational administration of state property, if the property belonging to such enterprise is insufficient to meet its obligations (Article 115(5)).

x. An individual may engage in any form of entrepreneurial activity not specifically prohibited by law (Article 18). To do so, an individual, unless the governing law stipulates otherwise, does not have to form a legal entity (Article 23(1)). In other words, unless an applicable law otherwise provides, an individual can engage in any form of business activity in the form of a sole proprietorship. Some business, however, may require the formation of a legal entity of a specific type. In such instances, which must be specifically stipulated by law, an individual may not engage in such commercial activity in the form of a sole proprietorship. If a specific type of economic activity requires a state license, a sole proprietor may engage in such activity only after he has obtained the requisite state license.

Because the new law of enterprise organization which is embodied in the 1994 Civil Code contains substantial modifications to the existing Russian law of enterprise organization, which was contained in the FPCivL of 1991, Article 6 of the "Law on the Entry into Force of the Civil Code of the Russian Federation: Part One" contains the following transitional provisions: Chapter 4 of the Civil Code (Part One) shall go into force on the date of the official publication of the Code; starting from this date, enterprise organization may be formed only in one of the forms recognized by Chapter 4 of the Code; after the date of the official publication of the Civil Code, the procedure for the formation of a business enterprise shall conform with the procedure set forth in Chapter 4 of the Code, unless a different procedure is stipulated in Article 8 of this law; to general partnerships, mixed partnerships, limited liability partnerships, joint stock companies of the

open type, and joint stock companies of the closed type formed prior to the date of the official publication of the Civil Code, the provisions of Chapter 4 of the Civil Code dealing respectively with general partnerships in Articles 69–81, limited partnerships in Articles 82–86, limited liability companies in Articles 87–94, and joint stock companies in Articles 96–104 shall apply; the foundation documents of the corresponding business organizations that were formed prior to the date of the official publication of the Code shall continue to operate to the extent that they are not inconsistent with the new law in Chapter 4 of the Code; the foundation documents of general partnerships and limited partnerships that were formed prior to the date of the official publication of the Civil Code shall be brought into compliance with the requirements of Chapter 4 of the Code by a deadline of July 1, 1995; the foundation documents of limited liability partnerships, joint stock companies, and production cooperatives that were formed prior to the date of the official publication of the 1994 Civil Code shall be brought into compliance with the requirements of the provisions of Chapter 4 of the Code dealing with limited liability companies, joint stock companies, and production cooperatives pursuant to the timetable to be set forth in the subsequent laws dealing with limited liability companies, joint stock companies, and production cooperatives; all individual (family) enterprises, as well as enterprises created by business partnerships and companies, social and religious organizations, amalgamations, charitable foundations and other non-state enterprises on the basis of economic management, shall by the July 1, 1999 deadline, be transformed into business partnerships, business companies, and production cooperatives. Article 8 of this law states that until the entry into force of the new law on the Registration of Legal Entities and the new Law on the Registration of Rights to Immovable Property and Transactions Involving Immovable Property, the existing procedure for the registration of legal entities and registration of rights to immovable property and of transactions involving immovable property shall continue to apply.

2. Kazakstan (Articles 14, 19, 33–110)

The Kazak Civil Code's law of enterprise organization³⁹ is embodied in Articles 14, 19, and 33–110. Except for some insignificant terminological differences, the Kazak Civil Code's law of enterprise

39 For a critical analysis of the law of enterprise organization under the Kazak Civil Code of 1994, see Christopher Osakwe, *Law of Enterprise Organization Under the 1994 Civil Code of the Republic of Kazakstan: Commentary, Analysis and Critique*, RUSSIAN OIL & GAS GUIDE, July 1995, at 3.

organization substantially replicates its Russian counterpart. There are, however, a handful of substantive differences between these two bodies of law. Briefly stated, the major differences between the Russian and Kazak laws of enterprise organization boil down to the following core points:

a. Like the Russian Civil Code, the Kazak Civil Code places fifteen nominate forms of enterprise organization at the generous disposal of the entrepreneur. However, the designations of four of these forms differ from those of their Russian counterparts. This is so because the Kazak Code lumps under the generic name of business partnerships all business organizations denominated as partnerships and companies in the Russian Code. Thus, the Kazak Civil Code recognizes eight types of business partnership: general partnership, limited partnership, limited liability partnership, unlimited liability partnership, joint stock company of the open type, joint stock company of the closed type, subsidiary partnership, and dependent joint stock company. In other words, according to the Kazak Civil Code, the JSC (of both the open and closed types) is a form of business partnership. Because of this terminological mix-up, the Russian LLC is denominated as a limited liability partnership, the Russian unlimited company becomes an unlimited liability partnership, the Russian subsidiary company is transformed into a subsidiary partnership, and the Russian dependent company is called the dependent JSC.

b. Of the two instances of the subsidiary liability of a parent company for the obligations of a subsidiary company under Article 105(2) and Parts Two and Three of the Russian Civil Code,⁴⁰ the Kazak Civil Code recognizes only subsidiary liability of the parent company for the obligations of the subsidiary company if the bankruptcy of the subsidiary company is attributable to the fault of the parent company (Article 94(2) and (3)).

c. Unlike the definition of a dependent company in alternative terms in the Russian Civil Code,⁴¹ the Kazak Civil Code in Article 95(1) defines a “dependent JSC” as a JSC in which the parent company “owns more than 20 percent of its voting shares.” By implication, this definition excludes the possibility of a “dependent limited liability partnership,” which the Russian Code recognizes.

d. The formation and operation of a production cooperative shall require the participation of at least two persons (Article 96(2)).

e. Participants in a general partnership and general partners in a limited partnership may only be individuals (Article 58(3)).

40 See *supra* Part VI.D(1).

41 *Id.*

f. Article 58(4) requires all business partnerships to have two foundation documents, a charter and a foundation contract, with the exception of those business partnerships which are formed by one person. This imprecise formulation of Article 58(4) of the Kazak Civil Code could lead to the following legal nonsense: A general partnership, as well as a limited partnership, may be required to have both a charter and a foundation contract; a business partnership could technically be formed by one individual. To avoid such consequences, the second sentence in Article 58(4) states that "this foundation document of a business partnership formed by one person (one participant) shall be its character"⁴²; the second sentence in Article 58(3) stipulates that "a general partnership shall have at least two participants,"⁴³ and Article 72(4) states that "to limited partnerships shall be applied rules of the present Code dealing with general partnerships, to the extent that such rules do not conflict with the rules of this Code relating to limited partnerships."⁴⁴

E. Law of Secured Transactions

1. Russia (Articles 329–81)

The Russian Civil Code regulates the devices for securing the performance of obligations in Chapter 23 (Articles 329–81). Article 329(1) lists the following six devices for securing the performance of obligations: liquidated damages, mortgage, withholding of property of a debtor, suretyship, bank guarantee, and down payment. The Code does, however, leave open the possibility that law or contract may designate "other devices" for securing the performance of obligations. By comparison to the existing Russian law of secured transactions, Article 329 of the 1994 Code introduced two new security devices—withholding of property of a debtor and bank guarantee—to the existing security devices under the old law and leaves open the possibility that contract or law may stipulate other devices.⁴⁵ Typically, the primary contract which creates the obligations elects a security device agreed upon by the parties. But, even if the primary contract fails to stipulate a security device, one of the devices enumerated in Article 329(1) or "other devices" may apply by operation of law. Article 329(2) states that the "invalidity of an agreement on securing the performance of an obligation shall not entail the invalidity of this obligation (princi-

42 GK RF art 58(4).

43 *Id.* art. 58(3).

44 *Id.* art. 72(4).

45 *See generally* SHILOKHVOST, *supra* note 37, at 38–40 (1996).

pal obligation)."⁴⁶ By contrast, Article 329(3) states that "the invalidity of the principal obligation shall entail the invalidity of the obligation securing it unless established otherwise by a law."⁴⁷ Thus, for example, if a loan agreement is secured by a mortgage agreement, the validity of the loan agreement shall not be adversely affected by the invalidity of the mortgage agreement; but the invalidity of the loan agreement shall automatically invalidate the mortgage agreement. What follows below is a brief restatement of the general principles of each one of the six security devices enumerated in Article 329(1) of the Russian Civil Code.

a. Liquidated (Stipulated) Damages (Articles 330–33)

Article 330(1) defines liquidated damages as the monetary sum specified by law (legal liquidated damages) or contract (contractual liquidated damages) which the debtor shall pay to the creditor in the event of non-performance, improper performance, or late performance of a contractual obligation. This Article distinguishes between two types of liquidated damages—fine and penalty. The Civil Code contains the following general principles of liquidated damages: in order to receive liquidated damages, the creditor does not have to show that he suffered losses (Article 330(1)); the debtor shall not pay liquidated damages if he is not liable for the non-performance or improper performance of the obligation (Article 330(2)); regardless of the form of the basic obligation (written or oral), agreement on liquidated damages shall be in writing, and failure to observe this requirement shall render the agreement on liquidated damages void (Article 331); even if the contracting parties fail to sign an agreement on liquidated damages, the creditor shall be entitled to liquidated damages stipulated by law, and if law does not otherwise provide, the parties may increase the amount of liquidated damages stipulated by law (Article 331(1) and (2)); depending on its relationship to general damages there are four types of liquidated damages—exclusive (liquidated damages in lieu of general damages), punitive (liquidated damages in addition to general damages), alternative (choice of liquidated or general damages at the option of the creditor), and discounted (portion of liquidated damages not covered by general damages); in their contract the parties could stipulate the payments of any one of these four types of liquidated damages if the amount of liquidated damages is clearly out of proportion to the losses suffered as a result of the

46 GK RF art. 329(2).

47 *Id.* art. 329(3).

breach of obligation by the debtor, a court of law shall have the right to reduce the amount of the liquidated damages (Article 333(1)).

Russian commentators offer the following interpretations of the provisions of Articles 330–33 of the Russian Civil Code: the fault of the debtor is not a prerequisite for the payment of liquidated damages;⁴⁸ liquidated damages may be measured either in terms of a percentage of the amount of the obligation that was not performed or that was improperly performed, or in terms of a percentage of the amount of the obligation that was not performed or that was improperly performed, multiplied by the number of days by which the performance was late; in the latter instance, the amount could be computed up to the date the obligation was performed in full, or the amount could be capped by law or agreement between the parties;⁴⁹ a fine is paid in the event of non-performance or improper performance of an obligation, whereas a penalty is paid in the event of a late performance of an obligation. Because Article 330 of the 1994 Civil Code technically reproduces the text of Article 394 of the 1964 Russian Civil Code, the new Code's provisions on liquidated damages should be read against the backdrop of its 1964 antecedent.

Under Russian law as embodied in the 1994 Civil Code the institution of punitive damages performs two functions—as a security device and as a form of civil liability. As a device for securing the performance of a contractual obligation, liquidated damages are regulated in Articles 330–33 of the Civil Code. As a form of civil liability, liquidated damages are regulated in several provisions of the Civil Code, but mainly in Articles 12 and 394. In its role as a form of civil liability, liquidated damages serve three distinct purposes. They compensate the creditor for any general damages suffered (restorative purpose), deter the debtor from breaching the contract (preventative purpose), and penalize the debtor for breaching the contract (punitive purpose). Even though the parties are free to set the amount of liquidated damages in their contract, the Code grants the court the authority to enforce such provisions in the light of fairness and equity. Accordingly, the court has the right to reduce the amount of liquidated damages if it feels that the stipulated amount is grossly out of proportion to the damages suffered by the creditor.

48 KOMMENTARIJ K GRAZHDANSKOMY KODEKSU ROSSIJSKOJ FEDERATSII: CHASTI PEROJ [Commentaries on the Civil Code of the Russian Federation: Part One. 344 (1997)], (O.N. Sadikov ed., 1997) [hereinafter Sadikov, COMMENTARIES].

49 *See id.*

b. Mortgage (including Chattel Mortgage) (Articles 334–58)

Article 334(1) begins:

By virtue of a [mortgage] the creditor with regard to an obligation secured by a [mortgage] ([mortgage]holder) shall have the right, in the event of the failure of the debtor to perform his obligation, to receive satisfaction from the value of the [mortgaged] property preferentially before other creditors of the person to whom this property ([mortgag]or) belongs with the exceptions specified by law.⁵⁰

Article 334(1) goes on to add that “[t]he [mortgage]holder shall have the right to receive on the same principles satisfaction from insurance compensation for loss or damage of the [mortgaged] property irrespective of to whose benefit it was insured unless the loss or damage occurred for reasons for which the [mortgage]holder is liable.”⁵¹ Article 334(3) recognizes two types of mortgages, contractual and legal. The former arises as a result of a contract, the latter arises by operation of law.

Other principles of the law of mortgage contained in the Code include the following: the mortgagor may be the debtor himself or a third party (Article 335(1)); the mortgagor of a thing may be its owner or the person who holds the right of economic management to it (Article 335(2)); and the object of a mortgage may be any property, including things and property rights (claims), with the exception of property that is taken off commercial circulation by law (*res extra commercium*) or claims inseparably linked with the individual personality of the creditor (Article 336(1)). Additionally, there are two kinds of mortgages: one in which the mortgaged object remains in the possession of the mortgagor (non-possessory mortgage), and one in which the mortgaged property is turned over to the mortgagee (possessory mortgage). Mortgaged real property, as well as mortgaged goods which are in commercial circulation, shall not be turned over to the mortgagee (Article 338(1)); a mortgage contract shall be in writing; a mortgage contract on immovable property shall be notarially certified and registered with the state registrar of mortgages (Article 339(3)); if not prohibited by the first mortgage agreement, secondary mortgage of an object shall be permitted (Article 342(2) and (3)); in the event of a second or any other subsequent mortgage, the mortgagor shall inform each subsequent mortgagee of all existing mortgages of the given property (Article 342(2) and (3)).

50 GK RF 334(1).

51 *Id.*

The Civil Code further provides in Article 343(1) that, unless otherwise provided by law or contract, the party that has possession of the mortgaged object shall insure the property at the expense of the mortgagor (Article 343(1)). Levy of execution against mortgaged property to secure the claims of the mortgagee (creditor) may be allowed in case of non-performance or improper performance by the debtor of the obligation secured by the mortgage under Article 348(1). If any of the six grounds enumerated in Article 351 is present, a mortgagee shall have the right to demand premature performance of the obligation secured by a mortgage. A mortgage shall be terminated on any one of the following four grounds found in Article 352(2): a gross violation by the mortgagee of his responsibilities to insure and safeguard the mortgaged property, a destruction of the mortgaged property, termination of the mortgaged right, a sale of the mortgaged property at a public auction. A mortgagee may, according to Article 355, assign his right on a mortgage contract to another person by following the rules in Articles 382–92 of the Code governing the assignment of rights. The mortgage of goods in commercial circulation and pledge of items in a pawnshop are regulated by Articles 358 and 359, respectively, of the Code.

c. Withholding (Articles 359–60)

A creditor who has in his possession an object subject to transfer to a debtor or to a person specified by the debtor, in the case of non-performance by the debtor of his obligation to pay for this item or compensate the creditor for expenses and other losses associated with it within a specified time limit, shall have the right to withhold it until such time as the appropriate obligation is performed (Article 359(1)). Withholding of an item may also secure such claims which, although not associated with payment for the item or compensation of expenditures or other expenses associated with it, nevertheless arise from an obligation whose parties are acting as entrepreneurs (Article 359(1)). Claims of a creditor who withholds an item shall be satisfied at the expense of its value to the extent and in accordance with the procedure specified for the satisfaction of claims secured by a mortgage (Article 360).

d. Suretyship (Articles 361–67)

Under a suretyship contract, the surety obligates himself to the creditor of another person to answer for the performance by the latter of his obligations in full or in part. A suretyship contract, according to Article 361, may also be concluded to secure a future obligation. Arti-

cle 362 requires that a suretyship contract must be in writing. In the event of non-performance or improper performance by the debtor of the obligation secured by a suretyship, the surety and the debtor shall be solidarily answerable to the creditor, unless the law or suretyship contract specifies subsidiary liability of the surety (Article 363(1)). Suretyship shall terminate under any one of the grounds stipulated in Article 367: upon termination of the obligation secured by the suretyship, in the event of change in this obligation entailing an increase in the liability of or other unfavorable consequences for the surety (without the consent of the latter), upon transfer of the debt or obligation secured by the surety to another person (if the surety fails to give his consent to the creditor that he will be liable for the new debt), if the creditor refuses to accept the proper performance proposed by the debtor or surety, upon termination of the period specified in the suretyship contract for which it was issued.

e. Bank Guarantee (Articles 368–79)

By virtue of a bank guarantee, a bank, other credit institution, or insurance organization (guarantor) shall issue, upon request of another person (principal), a written obligation to pay the principal's creditor (beneficiary) a monetary sum in accordance with the conditions set forth by the guarantor of the obligations upon presentation of written demand of its payment by the beneficiary (Article 368). The obligation of the guarantor to the beneficiary specified by the bank guarantee shall not depend, in relations between them, on the basic obligation for the performance of which it was issued as security, even if the guarantee contains reference to this obligation (Article 370). Unless otherwise specified in the bank guarantee itself, a bank guarantee shall be irrevocable (Article 371). The obligation of the guarantor to the beneficiary specified in the bank guarantee shall be limited to the payment of the sum for which the guarantee was issued (Article 377(1)). A bank guarantee shall terminate upon one of the following grounds stipulated in Article 378: payment to the beneficiary of the sum for which the guarantee was issued; expiration of the period specified in the guarantee for which it was issued; the refusal by the beneficiary of his rights under the guarantee and its return to the guarantor; or the refusal by the beneficiary of his rights under the guarantee by means of written statement releasing the guarantor from his obligations.

f. Down-payment (Articles 380–81)

Article 380(1) defines down-payment as the monetary sum given by one contracting party to be credited to the amount it owes to the other party under a payment contract, as proof of the conclusion of the contract and security for its performance. Under this definition, down-payment serves four purposes in Russian law: it evidences the conclusion of a contract, it secures the performance of the contract, it is a form of payment on the contract, and it serves as a form of civil liability for breach of the contract. As a security device, down-payment can only be used to secure a contractual obligation. Article 380(2) requires that a down-payment contract shall be in writing regardless of the amount of the down-payment. If, as a result of the failure by the parties to conclude the down-payment agreement in writing, there is doubt as to whether the amount paid by the debtor is a down-payment or an advance, under Article 380(3) such payment shall be treated as an advance. In other words, there is a rebuttable presumption that such payment is an advance until an acceptable proof to the contrary is shown.

The Code itself does not spell out the difference between a down-payment and an advance. However, a leading Russian commentator opines that a downpayment performs four functions noted in the foregoing paragraph. By contrast, an advance merely serves as payment under an obligation. If the parties fail to conclude a written agreement on down payment, any payment made by the debtor to the creditor shall be treated as an advance.⁵² In other words, Sadikov interprets Article 380(3) to mean that if the parties fail to conclude a written agreement on a down-payment, the law creates an irrefutable presumption that such payment is an advance. However, another Russian commentator disagrees with this reading of Article 380(3)—instead it merely creates a rebuttable presumption that if the parties failed to sign a written agreement on down-payment, the disputed payment shall be treated as an advance.⁵³ I agree with the latter interpretation of the nature of this presumption. The object of down-payment is always money. Because the law does not stipulate the amount that may be paid as down-payment, the amount shall be determined by agreement of the parties. In any event, the amount of down-payment

52 See Sadikov, COMMENTARIES *supra* note 48, at 376.

53 GRAZHDANSKII KODEKS ROSSIISKOI FEDERASKI: CHAST PERVAYA-NAUCHNO-PRAKTICHECKII KOMMENTARII [CIVIL CODE OF THE RUSSIAN FEDERATION: FIRST PART—SCIENTIFIC-PRACTICAL COMMENTARIES] 580 (T.E. Abova et al., eds. 1996) [hereinafter Abova et al., COMMENTARIES].

may not exceed the amount of the debt.⁵⁴ In the event of a breach of a contract secured with a down-payment, the debtor is nevertheless liable to pay general damages to the creditor. In that case, the amount of down-payment shall be deducted from the total amount of general damages due to the creditor.

2. Kazakstan (Article 292–338)

Article 292(1) of the Kazak Civil Code reproduces the text of Article 329(1) of the Russian Civil Code. Like the latter, the Kazak Code recognizes six specific devices for securing the performance of an obligation: liquidated damages, mortgage, withholding of the property of a debtor, suretyship, bank guarantee, and down-payment. Like the Russian Code, the Kazak Code leaves room for “other devices” that may be stipulated either by law or by contract between parties. For some inexplicable reason, the Kazak Civil Code lists withholding of the property of a debtor in Article 292(1) as one of the permissible security devices, but fails to devote even one single article to this device in the entire Chapter 18 (Articles 292–338). It is not clear if this omission is deliberate or inadvertent.⁵⁵

F. Law of Tort

1. Russia (Articles 1064–101, 15–16, 19, and 150–52)

Even though the Russian Civil Code of 1994 recognizes several nominate torts (such as defamation, wrongful death, personal injury, property damage, and conversion), the Code sets forth one general law for all torts. In other words, modern Russian tort law does not provide for separate sets of rules for individual nominate torts. This feature distinguishes Russian tort law from Russian contract law, which tends to be casuistic. As such, throughout this analysis, reference will be to a Russian law of *tort*, not to the law of *torts*.

Russian law defines tort as a private wrong or injury resulting from the breach of a legal duty that exists by virtue of society’s expectations regarding interpersonal conduct. Under this law, the essential elements of a tort are: the existence of a legal duty owed by a defendant to a plaintiff, breach of that duty, injury to the plaintiff, and causal connection between the defendant’s conduct and the resulting injury to the plaintiff. Although the general basis of tort liability under Rus-

54 See Sadikov COMMENTARIES, *supra* note 48, at 376.

55 For a synopsis of the modern Kazak law of mortgages under the 1994 Kazak Civil Code, see M.K. SULEIMENOV & E.B. OSIPOV, ZALOGOVOE PRAVO [LAW OF MORTGAGES] (Almaty 1997).

sian law is fault, the law does contemplate several exceptional circumstances when tort liability may arise without fault.

Russian law notes a similarity among tort, crime, and breach of contract, but draws a fine line of demarcation among these three unlawful acts. Common to all three are the existence of a duty, breach of this duty, injury that results from the breach of this duty, and causal connection between the breach and the resulting injury. The fundamental difference among these three acts, however, is in the basis of the duty. In the case of a crime, the basis of the duty is the criminal code, which exhaustively enumerates the types of conduct that citizens must not engage in; in the case of a breach of contract, the basis of the duty is the contract itself; in the case of a tort, the basis of the duty is society's expectation regarding interpersonal conduct. Whereas the victim of a crime in all cases is society (even if the crime is directed at a private person or at the interests of a private person), the injured party in a tort or breach of contract could be a private person. While a criminal prosecution can typically only be initiated by the state, an action for tort or a breach of contract can be initiated by a private person. The same act may, in fact, contain both a crime and a tort, just in the same way that the same act may contain both a tort and a breach of contract. In the event of a coincidence of a crime and a tort in the same act, Russian law permits both criminal prosecution and private action in tort, as long as both actions are not pursued at the same time. But, in the event of a coincidence of a tort and a breach of contract in the same act, Russian law grants the aggrieved party the option of pursuing only one of the two options, to the exclusion of the other action. In this case, the aggrieved party's election of options will to a great extent depend upon the nature of the remedy being sought and the statute of limitations on the action being sought. The nature of the sanction (punishment) for a crime is different from that of a sanction (remedy) for a tort or breach of contract.

The tort law that is set forth in the Russian Civil Code of 1994 represents a progressive development of the law that was articulated in the FPCivL of 1991. The basic difference between Russian tort law under the 1991 FPCivL and under the 1994 Civil Code is that actions that were deemed non-actionable under the 1991 law are now actionable under the 1994 law. In order to be actionable under the 1994 law, the injury must fall within the zone of interests protected by law. The scope of this zone was substantially expanded by the 1994 Civil Code in comparison to the zone of interests protected under the 1991 FPCivL. In fact, the ordinary Russian citizen is so much in love with the expanded notion of actionability under the 1994 reforms, especially the introduction of action for civil defamation and of pecuniary

compensation for moral harm, that the Civil Code promises to transform Russia into a society of litigious paranoids.

Modern Russian law of tort is embodied in Articles 1064–101, 15, 16, 19, 150–52 of the 1994 Civil Code. The Code echoes as well as expands upon the constitutional foundations of modern tort law, which are contained in Articles 2, 21, 23, and 33 of the Russian Constitution of 1993. While the new law represents a bold departure from the old law that was reflected in the 1964 Russian Civil Code, the jump from the 1964 law to the 1994 law was gradual. A major point in this evolutionary process was represented by the FPCivL of 1991, which introduced several radical changes in Russian law of tort. The 1994 Civil Code represents a fine tuning of the principles of tort law that were codified in the 1991 FPCivL. The striking features of the new Russian law of tort may be reduced to the following: the new law regards moral harm as an actionable injury and permits pecuniary compensation for non-pecuniary harm; it removes the shield of sovereign immunity from the state and thus subjects the government to tort liability for the acts of state agencies and officials; products liability is a fixture of the new law; subject to a few exceptions specifically stipulated by law, the new tort law continues to disallow private plaintiffs the recovery of windfall profits in the form of punitive damages. Fault is regarded as the basis of all tort liability, with the notable exceptions of personal injury caused by ultra hazardous activities, injuries caused by the illegal acts of judges, criminal investigators and prosecutors, libel and defamation, and injury caused by defective products (which are subjected to the standards of strict liability); fault of the tortfeasor is presumed, but the defendant is given an opportunity to rebut such presumption. In the remaining portion of this analysis, I will attempt to crystallize the core principles of the modern Russian law of tort.

The foundation of modern Russian law of tort is articulated in Article 1064. According to this provision, harm inflicted on the person or property of any person, as well as harm inflicted on the property of a legal person shall be subject to compensation in full by the tortfeasor, or by another person, on whom the law places such liability. In a few exceptional situations the law may stipulate payment of compensation in excess of general damages. The tortfeasor's fault shall be presumed by law, but he may be released from liability if he can show that he was not at fault. By way of exception to the principle of fault-based liability, the law may in specific cases stipulate liability without fault. In the instances specifically provided by law, harm inflicted by lawful actions shall be subject to compensation, but if harm was inflicted at the request or with the consent of the victim and the

actions of the tortfeasor do not violate any ethical principles of society, compensation for harm may be refused by a court.

From the provisions of Article 1064 of the Code flow the following elements of tort under Russian law: unlawful action of the tortfeasor, harm suffered by the victim, fault of the tortfeasor, and causal connection between the actions of the tortfeasor and the harm suffered by the victim. As an exception to this rule, harm caused by lawful actions and actions without fault may be compensable in the instances specifically provided by law. To these four may be added a fifth element: legal capacity of the tortfeasor to bear liability for his tort. Under Article 17, the general age of legal capacity for tort liability is eighteen years.

Under Article 1065(1), the danger of causing harm in the future may be grounds for filing a lawsuit to prohibit an activity creating such danger. Article 1066 recognizes the necessity defense as a valid defense in a tort action. According to this provision, harm inflicted in a state of necessary defense shall not be compensated unless the limits of necessary defense were exceeded. By contrast, Article 1067 provides that harm inflicted "in a state of extreme necessity, that is, in order to eliminate a danger threatening the [tortfeasor himself] or other persons, if this danger under the given circumstances could not be eliminated by other means, must be compensated"⁵⁶ by the tortfeasor. The concepts of "necessary defense" and "extreme necessity" are defined in Articles 37 and 39, respectively, of the Criminal Code of the Russian Federation of 1996.⁵⁷

The principle of respondeat superior is articulated in Article 1068. According to this provision, a legal entity or an individual shall compensate for harm inflicted by its (his) employee in the course of performing his employment (work or official) obligations. For the purpose of respondeat superior, Article 1068 treats servants as employees of the master (1068(2)), and partners as employees of a business partnership or of a production cooperative (1068(3)), if these persons are acting within the "scope of their employment" when the tort occurred. Under the respondeat superior theory, if an employee, servant, or partner abandoned the business of the master and was acting on a frolic of his own when the tort occurred, the principal shall not be liable.

The substantive law principles of governmental tort liability are articulated in Articles 1069 and 1070. For purposes of governmental tort liability, all governmental acts (action or non-action) are divided

⁵⁶ GK RF art. 1067.

⁵⁷ See UK RF arts. 37, 39.

into two groups—discretionary-administrative acts and economic-technical acts. For the same purposes all governmental agencies are divided into two groups—group one includes all government agencies of all three branches of government other than the courts and criminal law enforcement agencies; group two includes the courts and criminal law enforcement agencies (*i.e.*, judges, criminal prosecutors and investigators, police departments, and prisons). Pursuant to Article 1069, harm caused to an individual or to a legal entity as a result of the illegal action of state agencies, local government agencies, or officials of these agencies, including the promulgation by state and local government agencies of acts that do not conform with the law and with other legal acts, shall be subject to compensation, if there is fault on the part of the offending agency or official. Article 1069 reflects the spirit of Article 33 of the Constitution and Article 16 of the Code.

Article 33 of the Constitution states that citizens of the Russian Federation shall have the right to petition personally, as well as submit personal or collective petitions to state agencies and local government agencies. The text of Article 16 of the Code, entitled “Compensation of Losses Caused by State and Local Government Agencies,”⁵⁸ is reproduced almost verbatim in Article 1069 of the Code. Article 127 of the FPCivL covered only the illegal acts of state (federal) agencies and their officials. Article 1069 has expanded the range of potential government tortfeasors to include local government agencies and their officials. The prerequisite of governmental tort liability under Article 1069 is the requirement that the offending act must take place in the course of performing a discretionary or administrative function. If the injury was caused by any one of these agencies or officials in the course of performing economic-technical functions, governmental tort liability shall not require fault of the offending agency or official. If the victim of an Article 1069 tort is an individual (as opposed to a legal entity), compensation could include compensation for moral harm under Article 151 of the Code.

Article 1070 deals specifically with liability for harm caused by illegal actions of investigative agencies, agencies of pre-trial investigation, the procurator’s office, and the courts. If the illegal acts of these agencies or officials result in any one of the serious consequences listed in Article 1070, governmental tort liability shall not require fault on the part of the offending agency or official. The specific consequences required for no-fault governmental tort liability under Article 1070 are: illegal conviction, illegal criminal prosecution, illegal pre-trial detention, illegal arrest followed by release on bond or on one’s

58 GK RF art. 1069.

own recognizance, and illegal imposition of an administrative sanction in the form of an arrest or correctional labor. Article 1070(2) goes on to state that if the harm caused by the illegal act of investigative agencies, pre-trial investigative agencies, or the procurator's office does not result in any of the forms of injury enumerated at the beginning of this paragraph, governmental tort liability shall require fault on the part of the offending agency or official. Article 1070 of the Code is an elaboration of the principle enshrined in Article 53 of the Constitution, according to which "each person shall have the right to compensation for harm caused by the illegal action (non-action) of state agencies and their officials." Article 1070 textually reproduces the provision of Article 127(2) of the FPCivL. For there to be liability under Article 1070, the offending action must be illegal.

In short, the law on governmental tort liability under the 1994 Civil Code may be reduced to the following four rules of thumb: if a governmental agency or official, other than courts and criminal law enforcement agencies, causes actual injury in the course of performing a discretionary-administrative function, governmental tort liability shall require two elements, illegality of the act and fault; if a government agency or official, other than courts and criminal law enforcement agencies, causes actionable injury in the course of performing an economic-technical function, governmental tort liability shall require only one economic element, illegality of the offending act, without the need to show fault; if a court, criminal law enforcement agency, or official causes actionable injury in the form of any one of the consequences enumerated in Article 1070(1), governmental tort liability shall require only one element, illegality of the offending act, without fault; if a court, criminal law enforcement agency, or official causes actionable injury that does not result in any of the consequences enumerated in Article 1070(1), governmental tort liability shall require two elements, illegality of the offending act and fault on the part of the offending agency or official. A juxtaposition of this Russian rule with its corresponding American rule indicates that the Russian rule subjects the government to more tort liability than does, for example, the U.S. Federal Tort Claims Act. Under this Russian rule, if a judge sentences someone to jail and in the course of serving the sentence the original judgment is overturned by an appeals court, the government shall pay compensation to the aggrieved person. Similarly, if a prosecutor brings charges against someone and the case goes to trial but the defendant is acquitted, the government shall pay the individual.

The general age of tort liability is eighteen years. To be liable, Article 21 of the Code states that the tortfeasor shall also have dispo-

tive capacity. However, the Civil Code contemplates situations in which liability may be imposed on other persons for the tort committed by a person under the age of fourteen years (Article 1073), between the ages of fourteen and eighteen years (Articles 1074 and 1075), declared as lacking dispositive capacity (Article 1075), declared as partially lacking dispositive capacity (Article 1077), or incapable of understanding the significance of his actions (Article 1078). The rule of thumb here is that parents (natural as well as adopted) or guardians shall be liable for harm caused by a minor below the age of fourteen years, unless they can prove that harm was not caused through their fault (Article 1073); minors between the ages of fourteen and eighteen years shall be independently liable on the general grounds for harm caused (Article 1074(1)). If a tortfeasor between the ages of fourteen and eighteen years does not have the income or other property to pay compensation for harm caused, the parents shall be subject to subsidiary liability, that is, compensation shall be paid in full or in part by his parents or guardians, unless the latter can prove that the harm was not caused as a result of their fault (Article 1074(2)). If a parent is deprived of parental rights and his child between the ages of fourteen and eighteen years causes harm within two years from the time of such deprivation, the parent shall be liable for the child's tort unless he can show that the child's offending act was not attributable to the child's bad upbringing by the parent (Article 1075). Harm caused by an individual declared as lacking dispositive capacity shall be compensated either by the guardian or by the organization obligated to exercise supervision over him, unless the latter can prove that the harm was not caused as a result of its fault (Article 1076(1)); harm caused by an individual limited in his dispositive capacity due to abuse of alcohol or narcotic substance shall be compensated for by the tortfeasor (Article 1077); an individual having dispositive capacity and also a minor between the ages of fourteen and eighteen years who caused harm in such a state that he was unable to understand the significance of his actions or to control them shall not be liable for the harm he caused (Article 1078(1)).

Article 1079 of the 1994 Civil Code repeats the principle of strict liability that was found both in the 1964 Civil Code (Article 454) and in the 1991 FPCivL. In addition to incorporating the language of the 1964 Code and the 1991 FPCivL, the 1994 Code built into Article 1079 the cumulated result of case law between 1964 and 1994. Consequently, Article 1079 of the 1994 Code is more comprehensive than its 1964 and 1991 antecedents. According to the new law, unless the possessor of a source of extreme danger can show that the harm was caused as a result of insurmountable force or the intentional act of

the victim, a tortfeasor shall be obligated to compensate for injury caused by ultra-hazardous activity even in the absence of fault on the part of the tortfeasor. Article 1079 defines ultra-hazardous activity to include the use of transport vehicles, mechanisms, electrical energy of high voltage, explosives, and strong poisons. In order for liability to arise under Article 1079, three elements are required: harm suffered by the victim, unlawful conduct on the part of the tortfeasor, and a causal connection between the injury and the conduct of the tortfeasor. The fault of the tortfeasor is not required for liability under this Article. The only defenses in an Article 1079 action are insurmountable force and intentional act on the part of the victim. Thus, one could say that Article 1079 is an exception to the general rule in Article 1064.

Grounds for liability under the special rules in Articles 1073, 1074, and so on of the Civil Code depend on whether the acts in question relate to Article 1064 (in which case fault shall be required) or to Article 1079 (in which case fault shall not be required) for liability. According to the definition of ultra-hazardous activity in Article 1079, the extreme danger connected with the listed instruments arises not from the nature of the instrument itself but from its use or exploitation. Thus, injury caused as a result of the operation of a motor vehicle would fall under Article 1079. But injury caused by a parked car that merely rolled down the road without a driver in it shall fall under Article 1064.

According to Article 1080, persons who cause harm jointly shall be solidarily liable to the injured. But the person who compensated for the harm caused by another person (such as an employee performing his work) shall have the right of indemnification against this person in the amount of the compensation paid, unless a different amount is established by law (Article 1081(1)). The effect of the act of the victim on the liability of the tortfeasor is discussed in Article 1083 as follows: harm caused as a result of the intentional act of the injured shall not be subject to compensation (Article 1083(1)); if the gross negligence of the injured party contributed to the cause or to the aggravation of the harm, depending on the degree of the fault of the injured or of the tortfeasor, the amount of compensation shall be decreased (Article 1083(2)); in the event of gross negligence on the part of the injured and absence of fault of the tortfeasor in the instances when liability arises regardless of fault, the amount of compensation shall be decreased or compensation for harm may be refused, unless law provides otherwise (Article 1083(2)).

Action for personal injury or wrongful death is regulated by Articles 1084–94. The general rule in Article 1084 is that actions for per-

sonal injury and wrongful death (including death in the course of performing military, militia, and other equivalent services) shall be compensated according to the rules in Chapter 59 of the Code, unless law or contract stipulates otherwise. In the event of the death of a breadwinner, the right to compensation for harm, according to Article 1088, shall pass to: any dependent of the deceased who at the time of the death of the breadwinner is unable to work as a result of disability; a posthumous child of the deceased; the parent(s) or spouse of the deceased or other persons who remain at home to provide care for dependents of the deceased; dependents of the deceased who lost his job within five years of the death of the breadwinner.

The new products liability law embodied in Articles 1095–98 boils down to one sentence: Regardless of fault and irrespective of whether or not a contractual relationship exists between the victim and the liable party, harm caused by a defective product, or faulty work or services shall be subject to compensation by the seller or manufacturer of the goods, or the person who performed the work or services. A person injured by a defective product, regardless of whether he is the buyer of such product, shall have the right, at his option, to seek compensation either from the manufacturer or the seller of the product (Article 1096(1)). In other words, the Code gives the plaintiff the choice of filing either a tort action or an action for breach of contract. The general statute of limitations for products liability actions is ten years, but a specific law may provide a shorter period or no time limit at all. The seller or manufacturer of goods, as well as the performer of work or provider of services, shall be released from liability if she can prove that the harm was caused by insurmountable force or resulted from the consumer's violation of the directions for the use or storage of the goods, work product, or services (Article 1098).

Compensation for moral harm is regulated in Articles 1099–101, as well as in Articles 19 and 150–52 of the Civil Code. Article 19 states that damage suffered by a citizen as a result of the unlawful use of his name shall be subject to compensation; in the event of the distortion or use of the name of a citizen by a method or in a form that defames his honor, dignity or business reputation, the rules provided in Article 152 apply. Before we take up the rule in Article 152, let us stop at Article 151 of the Civil Code, which is entitled "Compensation for Moral Harm." According to Article 151 the court, if it deems it fit to do so, may award pecuniary compensation for moral damages (physical or moral pain and suffering); in determining the amount of compensation for moral damages, the court takes into consideration the degree of fault of the tortfeasor, "other circumstances deserving of attention," and "the extent of physical or moral pain and suffering"

associated with the individual peculiarities of the victim.⁵⁹ If the moral injury was caused by libel or defamation the court, in determining the amount of compensation, shall consider the form of publication, the contents of the statement as well as the financial capability of the tortfeasor. The financial capability factor is considered by the court only if the tortfeasor is an individual as opposed to a legal entity. In any case, all these factors apply within the limits of reasonableness and fairness. In other words, the Civil Code does not cap the amount of damages that may be awarded as compensation for moral damages. On a case-by-case basis, the court shall make that determination for itself guided by the factors enumerated in Article 151 of the Code.⁶⁰

The thrust of the modern Russian law of civil defamation is spelled out in Article 152. The rules are as follows: liability for defamation does not require fault of the tortfeasor; any person has the right to demand in a court action that any information which defames his honor, dignity, or business reputation be retracted by the person who disseminated such information, if the latter cannot prove that such information corresponds to reality; at the demand of interested persons, the protection of the honor and dignity of a citizen may be permitted after the death of the victim; if the defamatory information was disseminated in the mass media, it shall be retracted in these same mass media; if the defamatory information was contained in a document issued by an organization, such document shall be subject to replacement or recall; the procedure for the retraction of defamatory information in other cases shall be determined by the court on a case-by-case basis; a person about whom a defamatory information was published in the mass media shall have the right to publish his rebuttal in the same mass media; a person about whom defamatory information was published shall have the right, in addition to demanding a retraction of the information, to demand compensation of losses and moral damages suffered as a result of such dissemination; if it is not possible to determine the identity of the person who disseminated the defamatory information, the victim shall have the right to petition a court of law for a declaratory judgment declaring the disseminated information as not corresponding to reality; the rules of this Article apply correspondingly to the protection of the business reputation of a legal entity.

59 GK RF art. 151(2).

60 For an insightful analysis of the formulas used by Russian courts to calculate compensation for moral injury, see A.M. ERDELEVSKII, *KOMPENSATSIIA MORAL'NOGO VREDA V ROSSII I ZA RUBEZHOM* [COMPENSATION OF MORAL INJURY IN RUSSIA AND ABROAD] (1997).

Leading Russian commentators have construed the rule in Article 152 of the 1994 Civil Code as essentially retaining the essence of Article 7 of the FPCivL of 1991. Its primary purpose is to protect the honor, dignity, and business reputation of individuals. It does, however, also protect the business reputation of legal entities. In order to be deemed defamatory under Article 152, the information must be false. In other words, truth is an absolute defense in any action under Article 152. Truthful information, no matter how distasteful it might be, cannot be deemed defamatory. To be untruthful, a statement has to be factual. A mere expression of an opinion can be wrong or clearly erroneous, but it cannot be truthful or untruthful. In other words, an opinion statement cannot be defamatory under the standards of untruthfulness. Civil defamation under Article 152 should be clearly distinguished from criminal defamation in Articles 129 and 130 of the Russian Criminal Code of 1996. Intent to defame is not a prerequisite of civil defamation. By contrast, specific intent to defame is a *conditio sine qua non* for criminal defamation under Articles 129 and 130 of the Criminal Code. Civil defamation may be disseminated in one of several forms: orally, in the mass media, or in a document or illustration (photograph, drawings, photo montage). Dissemination could be to just one person or to several persons. However, if the defamatory information was made only to the victim and not to anyone else, dissemination shall be deemed to be absent. The law presumes the falsity of the information, but places the burden of rebuttal on the defendant. The requisite three elements of civil defamation are falsity of the information, dissemination of the information, and damage to the honor, dignity, or business reputation of the victim. Even though fault is not a requirement for defamation, typically the fault of the defendant is in the form of reckless disregard for the truth, rather than intent to harm the victim.

Articles 2, 21, and 23 of the Russian Constitution of 1993 place the highest premium on human dignity. The purpose of Article 152 of the Civil Code, in addition to Articles 129 and 130 of the Criminal Code, is to protect such human value. Article 152 does not extend to defamatory information that may be contained in the judgment of a court, indictment by the procurator, conclusions by the agencies of preliminary investigation, or in the acts of other governmental agencies and officials. The procedure for seeking legal protection against defamation in such documents or acts is separately provided in Articles 1069 and 1070 of the Civil Code. If the victim of civil defamation believes that the conduct of the tortfeasor includes elements of a crime contained in Article 129 or 130 of the Criminal Code, that is, specific intent to defame, he may petition the procurator with a re-

quest to file criminal charges against the defendant. However, actions for civil and criminal defamation cannot be pursued concurrently. If the procurator refuses to file criminal charges or if the criminal court acquits the defendant of the charge of criminal defamation (for example, on grounds that the defendant lacked specific intent), the plaintiff is free to pursue his separate action for civil defamation.

Because truth is a critical element in an action for civil defamation, a statement that cannot be deemed true or false (such as an opinion) cannot by its nature be defamatory under Article 152 of the Civil Code. Action for civil defamation is not subject to a statute of limitation. Although the law places the burden on the defendant to prove that the statement is truthful, the burden of showing both dissemination and damage to the honor, dignity, or business reputation falls on the plaintiff. Even though a truthful statement cannot be deemed defamatory under Article 152, a truthful statement that is intrusive of personal or family privacy and thus causes moral damage(s) is actionable under Article 151. Article 23 of the Russian Constitution of 1993 specifically states that "each person shall have the right to the inviolability of his private life, the confidentiality of personal and family information, to the protection of his honor and good name."⁶¹ The constitutional rights in Article 23 of the 1993 Constitution are fully recognized and protected in Article 150 of the Russian Civil Code to the same extent for all persons—public figures or not. In other words, the standards for the protection of the privacy of public figures are the same as those for the protection of the privacy of private citizens. The law does not recognize any "public figure" exception to this rule. Article 151 of the Civil Code specifically serves as the vehicle for protecting the rights enshrined in both Article 150 of the Civil Code and in Article 23 of the Russian Constitution.⁶²

2. Kazakstan (Civil Code Draft Part Two)

On virtually every major point, the modern Kazak law of torts (including the law of governmental tort liability, products liability law, and law of defamation, the principle of respondeat superior and the general rules on vicarious tort liability), mimics the Russian law discussed above.

61 KONST. RF (1993).

62 See generally Abova et. al, COMMENTARIES, *supra* note 53, at 269–74; Sadikov, COMMENTARIES, *supra* note 48, at 198–99.

G. *Law of Property*

1. Russia (Articles 209–306)

The Civil Code devotes eight chapters (13–20) to the law of property. The chapters are denominated respectively as “General Principles” (Chapter 13), “Acquisition of the Right of Ownership” (Chapter 14), “Termination of the Right of Ownership” (Chapter 15), “Common Ownership” (Chapter 16), “Right of Ownership in Land and Other Rights In Rem in Land” (Chapter 17), “Right of Ownership of Residential Accommodation and Other Rights In Rem in a Residential Accommodation” (Chapter 18), “Right of Economic Management, Right of Operational Administration” (Chapter 19), and “Protection of the Right of Ownership and Other Rights In Rem” (Chapter 20).

Among the cornerstone principles of the modern Russian law of property⁶³ are the following: the law recognizes private property as being on an equal footing with public (state) property and grants equal protection to both state and private property; subject to the few exceptions which are specifically stipulated by law, any object may be held in private ownership; with regard to those objects that may be privately owned, the law does not establish any limit as to the quantity or amount of such property that may be owned by an individual; private property can be transferred by its owner at any time to any third party, subject to any applicable rules governing specific forms of transfer of property; the object of private property may include both things and rights; the owner of private property may transfer such property for trust administration to another person, without transferring the right of ownership to the trustee; without transferring the right of ownership, the state may transfer property belonging to it to an enterprise for the purpose of economic management or operational administration; all land and all natural resources of the land shall be owned exclusively by the state; the state may, however, grant the right of use, possession, and disposition of land and mineral resources to a private person (physical and legal person); the taking of private property for public need shall be permitted only in the specific instances stipulated by law and subject to the due process protections enshrined in the takings clause in Article 242 of the Civil Code.⁶⁴ Against this

63 For a synopsis of the core principles of the modern Russian law of property under the 1994 Russian Civil Code, see O. IU. SHILOKHOVOST ET AL., *GRAZHDANSKOE ZAKONODATEL'STVO ROSSII* [THE CIVIL LEGISLATION OF RUSSIA] 33–37 (1996).

64 For a discussion of the takings clause, see *supra* Part VI.B.

backdrop, let us examine some of the specific principles of the modern Russian law of property.

The right of ownership, as stated in Article 209(1), includes the right of possession, use, and disposition of the property. An owner shall have the right, at his discretion, to perform with regard to the property belonging to him any actions which do not contradict the law or other legal acts and which do not violate the rights and lawful interests of other persons. The rights of disposition of property, outlined in Article 209(2) and (3), shall include the rights to transfer ownership of the property to another person, to mortgage the property or in any other form encumber the property, and to transfer the property for trust administration to another person. Under Article 209(4), transfer of property for trust administration shall not entail transfer of the right of ownership to the trustee, who must administer the property in the interest of the owner or of a third party specified by the owner.

Article 212(1) of the Civil Code recognizes two forms of ownership—state (public) and private. Under Article 212(1) the term “state property” has two meanings—generic and brand. In its first meaning, it refers generically to all categories of public property (*i.e.*, federal, regional, and municipal property). In its brand meaning, it refers to federal and regional government property in contrast to “municipal property,” which refers to property of all municipal formations. In the language of Article 212(4), “the rights of all owners shall be protected equally.”⁶⁵ Except for individual types of property, which are specifically stipulated by law, any property may be owned by private citizens and legal entities (Article 213(1)). With the exception of instances specifically stipulated by law, the quantity and value of property that may be privately owned shall not be limited by law (Article 213(2)). The grounds on which the state may limit the quantity and amount of privately owned property are set forth in Article 1(2). Such grounds include the need to protect the foundations of constitutional order, public morality, health, or the rights and lawful interests of other persons, and to ensure the national defense and state security.

The rights in rem of persons who are not owners are enumerated in Article 216. Such in rem rights include: lifetime inheritable possession of a land plot which is regulated in Article 265 of the Civil Code; permanent (in perpetuity) use of a land plot as regulated in Article 268 of the Civil Code; servitudes, which are regulated in Articles 274–77; economic management of property, which is regulated in Article 294; and operational administration of property, which is regu-

65 GK RF art. 212(4).

lated in Article 296. Rights in rem in a property may belong to persons who are not owners of the property, and the transfer of the right of ownership of property to another person do not, according to Article 216(2) and (3), constitute grounds for the termination of other rights in rem in this property.

The rules governing the grounds for the acquisition of the right of ownership are set forth in Article 218 as follows: ownership of a new thing, manufactured or created by a person for himself with adherence to the law and other legal acts, shall be acquired by this person; ownership of fruits, products, and income received as a result of the use of property shall belong to the person using this property on a lawful basis, unless otherwise provided by law or contract on the use of this property; ownership of a property which has an owner may be acquired by another person on the basis of a contract of sale, barter, gift, or other transaction on the disposition of this property; in the case of death of a person, the property belonging to him shall pass by inheritance to other persons in accordance with a will or the law; in the case of the reorganization of a legal entity, ownership of the property belonging to it shall pass to the legal entities which are legal successors to the reorganized legal entity; in the case and in accordance with the procedures specified in the Code, a person may acquire the right of ownership of property which does not have an owner, of property whose owner is unknown, or of property which the owner has abandoned, of which he has lost the right of ownership for other reasons specified by law. Subject to the rules of acquisitive prescription set forth in Article 234, the rules governing the ownership of ownerless things, movable things which the owner has abandoned, found things, untended animals, and treasure trove are set forth respectively in Articles 225, 226, 227, 230, and 233.

The grounds in Article 235(1) for the termination of the rights of ownership include: the transfer of ownership by the owner to another person; rejection of ownership by the owner; destruction of the property; and loss of ownership on other grounds specified by law. To this general rule, Article 235(2) adds that the seizure of property from an owner is not permitted, except in the following instances: levy of execution against the property to satisfy obligations (Article 237); disposition of property which by virtue of law cannot belong to a particular owner (Article 238); disposition of immovable property in connection with the seizure of a parcel of land (Article 239); purchase of mismanaged, culturally valuable or poorly maintained domestic animals (Articles 240 and 241); requisition (Article 242); confiscation (Article 243); and in other instances set forth in Article 252(4), Article 272(2), and in Articles 282, 285, and 293 of the Civil Code.

The chapter on common ownership (Chapter 16: Articles 244–59) recognizes two forms of common ownership—shared ownership and joint ownership. Shared ownership specifies the share of each of the owners in the right of ownership, while joint ownership does not (Article 244(2)). Disposition of property held in shared ownership is carried out by agreement of all its participants (Article 246(1)). Possession and use of property held in shared ownership is carried out by agreement of all its participants, or in the case of failure to reach an agreement, by a court decision (Article 247(1)). Each participant in shared ownership participates in proportion to his share in the payment of taxes, fees, and other payments on the common property, as well as in the expenses for its maintenance and preservation (Article 249). Participants in joint ownership, unless otherwise specified by agreement among them, possess and use the common property jointly (Article 253(1)). Disposition of property held in joint ownership is carried out only by agreement of all participants, which is presupposed regardless of which one of the participants concludes the transaction on the disposition of the property (Article 253(2)).

The rule governing the levy of execution against a share in common property is set forth in Article 255. A creditor of a participant in shared or joint ownership, in the case of insufficiency of other property held by the owner, has the right to submit a claim of apportionment of the debtor's share of the common property for the purpose of levying execution against such share. If in such case the apportionment of the share in kind is impossible, or if the other participants in the shared or joint ownership object to it, the creditor shall have the right to demand that the debtor sell his share to the other participants in the common ownership at a price commensurate with the market value of his share and to use the proceeds from the sale to pay off the debt. If, however, the other participants in the common ownership refuse to acquire the debtor's share, the creditor has the right to petition a court to permit the levying of execution against the debtor's share in the right of common ownership, and to demand sale of this share at public auction.

Russia is a community property state and the regulation of the common ownership of spouses is set forth in Article 256. The Article provides that property acquired by spouses during their marriage is joint property if a different regime of this property is not specified by an agreement between them. Property belonging to each of the spouses prior to marriage, as well as that obtained by one of the spouses during the marriage as a gift or in the form of an inheritance, is the spouse's individual property. Any item of individual use (such

as clothing or shoes), with the exception of precious jewelry and other luxury items, even though acquired during the marriage at the expense of the common funds of the spouses, is considered to be the property of that spouse who uses them. Unless an agreement between the spouses otherwise provides, property of each of the spouses may be considered their joint property if it is established that in the course of the marriage, at the expense of the common property or of the personal property of the other spouse, improvements were made which significantly increased the value of this property (such as capital repair, reconstruction, or re-equipment). On obligations of one of the spouses, execution may be levied only against the property held in his ownership, as well as against his share in the common property of the spouses which was due him upon division of this property. Additional rules defining the shares of the spouses in the common property upon its division, and the procedure for such division, is established by the Code on Marriage and the Family (Family Code).

A major chunk of the law of property is embodied in Chapter 17, governing the right of ownership of land and other rights in rem in land. Because of the politically charged character of the question of land ownership in Russia, and the need to reconcile the provisions of the Civil Code and the Land Code on this matter, Chapter 17 of the Civil Code opens with the caveat that "Chapter 17 of this Code shall become effective from the day that the Land Code of the Russian Federation adopted by the State Duma of the Russian Federation goes into effect."⁶⁶ As of the time of this writing, the new Russian Land Code that was passed by parliament was vetoed by the President and remanded to parliament for its reconsideration and thus has not gone into effect. Against this backdrop, let us examine the salient principles of modern Russian law of land ownership, possession, and use.

This discussion should begin with a reference to the provisions of Articles 214 and 209 of the Civil Code. In anticipation of the day when the new Land Code will permit private ownership of land, Article 214(2) states that "land and other natural resources which are not held in the ownership of citizens, legal entities or municipal formations shall be deemed to be state property."⁶⁷ Article 209(3) adds that possession, use, and disposition of land and other natural resources, to the extent to which their commercial circulation is permitted by law (Article 129), shall be undertaken by their owner freely if this does not inflict damage upon the natural environment and does not violate the rights and lawful interests of other persons. Finally, Article 129(1)

66 *Id.* chap. 17.

67 *Id.* art. 214(2).

notes that "objects of civil law rights may be freely disposed of or transferred from one person to another in the order of universal succession . . . or by other means, if they are not taken out of commercial circulation or not limited in their commercial circulation."⁶⁸ To close this preliminary discussion, Article 129(3) states that land and other natural resources may be disposed of or transferred from one person to another by other methods, to the extent to which their commercial circulation is permitted by the laws on land and other natural resources. In other words, the entire regulation of land ownership in Chapter 17 is predicated upon the anticipation that private land ownership in Russia is just around the corner and that the forthcoming land code will endorse the anticipatory permission of private land ownership which is strategically planted at various sections of the 1994 Civil Code. The point that must not be forgotten in this discussion is that, at the time of this writing, private land ownership is not permitted by Russian law. It will be a great credit to President Yeltsin's political authority if he can sell the communist-dominated State Duma on the idea of private land ownership in the forthcoming Russian Land Code.

The first article in Chapter 17 of the Civil Code states that any person who owns land has the right to sell, donate, mortgage, lease, or otherwise dispose of such land (Article 260(1)). To prevent the uncontrolled conversion of farmland into industrial use, Article 260(2) states that land designated as agricultural land shall be used only for that purpose. Article 264 governs the rights to land by persons who are not owners of such land. According to this provision: land plots and other immovable property located on them may be granted by their owners to other persons for permanent or fixed time use, including for lease; a person who is not the owner of a land plot shall exercise his rights of possession and use of the plot on the conditions and within the limits established by law or by contract with the owner; a person who holds a land plot in his possession but is not the owner does not have the right to dispose of this plot, unless otherwise specified by law or by contract.

The institution of servitude is recognized in modern Russian law of property. Typically, a servitude is established for the purpose of providing access and passage through the neighboring land plot, laying and operating electrical transmission lines, communications lines, and pipelines, and providing for water supply and reclamation, as well as other needs of the owner of the immovable property which cannot be ensured without establishing the servitude. Defined briefly, servi-

68 *Id.* art. 129(1).

tude refers to building restrictions and restrictions relating to land use that are established by covenants between landlords.

Selected provisions of the law on servitude are found in Articles 274–77. Pursuant to these Articles, the owner of immovable property has the right to demand from the owner of a neighboring land plot, and in necessary cases also from the owner of another land (neighboring plot), the granting of the right of limited use of the neighboring plot (servitude). Granting of a servitude on a land plot does not deprive the owner of the said land plot of the rights of possession, use, and disposition of this plot. A servitude is established by agreement between the party requesting the servitude and the owner of the neighboring land plot and is subject to registration in accordance with the procedure established for the registration of rights to immovable property. The owner of the land plot encumbered with the servitude has the right, unless otherwise specified by law, to demand commensurate payment for use of the land plot from the person in whose interest the servitude was granted. A servitude is retained in the case of transfer to some other person of rights to the land plot which is encumbered with this servitude; it cannot be an independent object of sale or mortgage, and it may not be transferred by any means whatsoever to persons who are not owners of the immovable property for whose use the servitude was established. Upon demand of the owner of the land plot encumbered with the servitude, the servitude may be terminated by reason of the fact that the grounds on which it was established no longer exist; in cases when the land plot, as a result of encumbrance with a servitude, cannot be used in accordance with its designated purpose, the owner has the right to demand in court the termination of the servitude.

The detailed regulation of the ownership of condominiums is reserved for the housing code. But the skeletal principles of this element of the law of property are embodied in Articles 289–91. Article 291 defines a condominium as a partnership of residential owners, that is, a non-commercial organization created by the owners of apartments in a multi-apartment building for the purpose of ensuring the exploitation of the building and the use of their common property. According to Article 290, the owners of apartments in this building have the right of common shared ownership of the common quarters of the building, the load-bearing structures of the building, and the mechanical, electrical, sanitary-technical, and other equipment outside and inside an apartment which serves more than one apartment. In the language of Article 244(2) of the Civil Code, a multi-apartment building which contains several condominium apartments is a shared common property. The owner of an apartment in a multi-

apartment building, along with the portion of the building taken up by his apartment, also owns a share of the right of ownership to the common property of the building (Article 289).

The institutions of economic management of property and operational administration of property are native to the Soviet socialist legal system that existed in Russia until 1991. In reforming the legal system of post-Soviet Russia, the drafters of the Civil Code of 1994 succumbed to the urge to retain certain elements of pre-1991 Soviet law. The concepts of economic management of property and operational administration of property are among such holdovers from the Soviet era. Chapter 19 of the Civil Code is devoted to these two elements of modern Russian law of property.

According to Article 294, a state or municipal enterprise to whom property belongs with the right of economic management shall possess, use, and dispose of this property within the limits defined in the Code. Article 295 sheds some light on the relationship between the owner of the property and the enterprise to which the property is entrusted with the right of economic management. Thus, according to Article 295, the state creates an enterprise, defines its objectives and purpose of its activities, appoints the directors of the enterprise, exercises control over the enterprise to ensure its compliance with the purpose set forth in its charter, takes measures to safeguard the property entrusted to the enterprise, and is entitled to receive part of the profits generated from the use of the property by the enterprise. In short, the enterprise is a fictional extension of the state. According to Article 295(2), this enterprise does not have the right to sell immovable property transferred to it by the state with the right of economic management, to lease it, mortgage it, contribute it as an investment in the charter capital of a business company or partnership, or to dispose of this property by any other means without the consent of the owner—the state.

An enterprise that receives state property with the right of operational administration of such property is in exactly the same situation as the one which received state property with the right of economic management. The principal difference between the legal regimes of these two enterprises boils down to two things—the purpose of the enterprise and the degree of its financial autonomy from the state. The purpose of an economic management enterprise is economic, that is, it engages in economic activities and thus is profit-making. By contrast, the purpose of an operational administration enterprise is administrative, which makes it a non-profit organization. Because an economic management enterprise is profit-making, it is financially independent of the state and does not receive any budget allocations

from the state. By contrast, an operational administration enterprise survives merely on allocations from the state budget. Sometimes the operational administration enterprise is referred to as a "budget-supported enterprise." Examples of budget-supported state enterprises are educational institutions, research organizations, ministries, and agencies.

2. Kazakstan (Articles 188–267)

Modern Kazak law of property as embodied in Articles 188–267 of the Civil Code of 1994, and also in the Law of the Republic of Kazakstan "On Housing Relations" of April 15, 1997 (No. 94–1 ZRK Chapters 6–7), is a mirror reflection of the Russian law discussed above. Deviations of the Kazak law from its Russian prototype are de minimis.

H. Law of Contracts

1. Russia (Chapters 9, 21, 22, 24–29, 30–49, 51–55, 58)

a. Distinguishing Features of the New Law

The Russian Civil Code of 1994 embodies not one law of contract, but the law of several contracts. To be exact, the Russian Civil Code embodies the law of twenty-six nominate contracts, plus one general law of contract. In other words, modern Russian contract law is characterized by the institute of nominate contracts and for each nominate contract there is, as it were, a separate "form of action." This casuistic character of Russian contract law (that is, its tendency to have specific sets of rules for specific types of contracts, rather than one omnibus set of rules for all contracts) on its face resembles the common law writ system, but was actually borrowed from Roman private law by way of German law. As such, throughout this analysis reference will be to the law of contracts, not to a law of contract.

Under Russian law, a contract (*dogovor*) is a promise (*obeshchanie*) or a set of promises, for the breach (*narushenie*) of which the law gives a remedy (*sanktsiia*), or the performance (*ispolnenie*) of which the law in some way recognizes as an obligation (*obiazatelstvo*). The essentials of a valid contract under the general Russian law of contract are: capacity (*deesposobnost*) of the parties to contract, a lawful subject matter, mutuality of agreement, mutuality of obligation, agreement on the significant conditions of the contract, and participation of two or more parties. Thus, under Russian law, consideration is not an essential element of all contracts. Some contracts (onerous contracts) do have consideration, but not all contracts (gratuitous contracts) re-

quire consideration as an essential element. The Russian Civil Code maintains a subtle distinction among the notions of obligation, transaction, contract, and agreement. The Russian term "*obiazatelstvo*" is translated as "obligation" in English, "*sdelka*" as "transaction," "*dogovor*" as "contract," and "*soglashenie*" as "agreement." Under the general principles of the Law of Transactions in Chapter 9 of the Russian Civil Code: a contract is a species of transaction; a transaction is a species of obligation; agreement is an essential element of a contract; all contracts are obligations, but not all transactions are contracts; all contracts create obligations, but not all obligations are contractual; all contracts require the agreement of the parties on the significant conditions of the contract; a contract is a transaction which requires the expression of the coordinated will of two or more parties, whereas a unilateral transaction is one in which the expression of the will of one of the parties shall be necessary and sufficient. In Russian legal literature, however, the terms obligation, contract, and agreement are sometimes used interchangeably, albeit incorrectly, to mean the same thing.

Modern Russian law of contracts as embodied in the 1994 Russian Civil Code follows the continental European civil law theory of contract, rather than the common law of contract. However, on certain core questions of contract law, Russian law departs quite substantially from its continental European prototype. Consequently, Russian contract law can best be described as a *sui generis* modification of continental European civil law theory of contract. The striking features of this law are as follows: the formation of a contract does not need consideration; an offer that stipulates a fixed term for its acceptance cannot be withdrawn by the offeror at any time within the fixed time limit (irrevocability of an offer); if the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time limit, the offer shall be irrevocable for a reasonable time; an agreement by the parties that the offeror is bound by his offer for a specified period of time, and that the offeree may accept within that time, creates an option contract which is different from an irrevocable offer; in the few instances specifically stated by law, the noble principle of freedom of contract is superseded by the concept of obligation to contract; a recognition of the institution of public contract under which the autonomy of one party to choose his contracting party is severely restricted; an endorsement of the concept of administrative price fixing which, in specific instances, requires the contracting parties to adhere to administratively determined prices for certain goods and services; a "letter of intent" is a non-binding, pre-contractual agree-

ment between the prospective contracting parties, notwithstanding any intent by the parties to give it a binding effect.

b. Digest of the New Law

Before analyzing the rules of the modern Russian law of contracts, let me interject this preliminary digest of the law on the books. Russian law defines a contract as a binding agreement between two or more parties whereby obligations are created, modified, or extinguished. The making of a contract requires an offer, an acceptance, a meeting of the minds on the significant conditions, and compliance with the requisite form. Contract is only one source of obligations. Other non-contractual sources of obligations are tort, unjust enrichment, agency without authority (*negotiorum gestio*), and unilateral obligation. The implication of the latter point is that under Russian law there is no such thing as a unilateral contract. A contract can only be either bilateral or multilateral. The phenomenon that is sometimes referred to as a unilateral contract in Western literature, that is, a situation in which one party accepts the obligation of the other party but does not assume a reciprocal obligation, is classified as a unilateral obligation under Russian law. In other words, a one-sided agreement whereby one makes a promise to do, or refrain from doing something in return for a performance not a promise is regarded, under Russian law, as a unilateral obligation.⁶⁹

Russian law recognizes the following types of contract: onerous and gratuitous, principal and accessory, nominate and innominate, commutative, aleatory, bilateral (synallagmatic), written and oral, void and voidable, divisible and indivisible, accession, preliminary, public, model, and contract for a third party. An onerous contract is one in which each of the parties obtains an advantage in exchange for its obligation. A gratuitous contract is one in which one party obligates himself towards another for the benefit of the latter, without receiving any advantage in return. An accessory contract is one which serves as security for the performance of another contract. When the secured contract arises from a contract either between the same parties to the accessory contract or between other parties, the secured contract is the principal contract. A nominate contract is one which is given a specific name and thus is subject to a specific set of rules. An innominate contract is one that does not have a specific designation. A commutative contract is one in which the performance of the obligations of each party is correlative to the performance of the other. An

69 Examples of a unilateral obligation are a "Public Promise of an Award" in Chapter 56 and a "Public Competition" in Chapter 57 of the Russian Civil Code.

aleatory contract is one in which, because of its nature or according to the parties' intent, the performance of each party's obligation, or the extent of the performance, depends on an uncertain event. In other words, an aleatory contract is one the performance of which is by its own terms subject to the happening of an uncertain and fortuitous event, or upon some fact the existence or past occurrence of which is also uncertain and undetermined. Examples of aleatory contracts include life and fire insurance contracts. Notwithstanding the fact that at the time of the making of the contract there is uncertainty as to the time of occurrence of the contingent event, the contract is nevertheless enforceable as long as the risk undertaken is apparent. By its nature a gambling contract (one where performance is contingent upon the outcome of a bet) is an aleatory contract and is enforceable under Russian law.⁷⁰ A bilateral or synallagmatic contract is one in which the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other party. In other words, under a bilateral contract there are mutual promises between two parties to the contract, each party being both a promisor and a promisee. A written contract is one which by law shall be in writing. In addition, the law may require that certain written contracts be additionally notarized.

An oral contract is one which is concluded orally, that is, not in writing or not signed by the parties. A contract is void if it is null *ab initio*, that is, empty, lacking legal force, and thus unenforceable. A contract is voidable if it is capable of being annulled at a later time, that is, it is presumed valid until it is voided. A contract is divisible if some of its parts exist independently of the whole and are therefore independently enforceable. An indivisible contract is one in which all the parts exist in tandem and are inseparable from the whole or independently enforceable. An accession contract is one whose conditions are defined by one of the parties in formulas and other standard forms and may be accepted by the other party by no other way than to accede to the proposed contract in its entirety. Typically, an accession contract is so heavily restrictive of one party, while so non-restrictive of another, that doubts arise as to its representation as a voluntary and uncoerced agreement. A Russian accession contract, which corresponds to an adhesion contract under American law, implies a grave inequality of bargaining power. Because the law recognizes the fact that there is no true equality in bargaining power in such contracts, Russian courts are given greater latitude in construing such contracts.

70 The provisions of the Russian Civil Code covering nominate contract of gambling are located in Chapter 58.

Under a preliminary contract, the parties obligate themselves to conclude a contract in the future on the conditions specified in the preliminary contract. A public contract is one in which, by virtue of the character of the activities of one of the contracting parties, the seller of goods (performer of work or provider of services) is obligated to contract with any party that wants to contract with it, and shall do so at a price established uniformly for all consumers. A model contract is one whose conditions are established by an administrative authority and whose term must be incorporated into contracts concluded by private parties in the instances stipulated by law. A contract for a third party is one in which the debtor shall perform, not to the creditor, but to a third party.

The general principles of contract law that are articulated in Part One of the Civil Code apply generally to all contracts—nominate as well as innominate. However, with regard to nominate contracts which are regulated in Part Two of the Civil Code, special rules apply. The rule of thumb here is that with regard to the nominate contracts, the provisions in Part One operate as *lex generalis*, while the provisions in Part Two regarding each nominate contract operate as the *lex specialis*. The relationship between these two sets of rules is governed by the principle of *lex specialis derogat generali* (that is, in the event of a conflict between a general rule and a special rule, the special rule shall supersede the general rule). Part Two of the Civil Code recognizes twenty-six nominate contracts, and to each one of such contracts it devotes a separate chapter. The twenty-six nominate contracts are as follows: sales, barter, gift, annuity and life estates, lease, lease of a residential accommodation, gratuitous use, independent contractor work, performance of research, development and process engineering work, compensable services, carriage, forwarding, loan and credit, financing against assignment of a monetary claim, bank deposit, bank account, settlement of account, bailment, insurance, agency, commission agency, agency service, trust administration of property, franchise, simple partnership, and gambling.

Under Russian law, all persons have the capacity to contract, with the exception of unemancipated minors and persons deprived of reason at the time of contracting. A fully emancipated minor has full contractual capacity. Generally speaking, a contract made by an unemancipated minor is void. However, certain contracts made by unemancipated minors (such as contracts to provide the minor with something necessary for his support or education, or for a purpose related to his business), as well as those made by persons without capacity by reason of interdiction or deprivation of reason, are voidable.

A fake contract, like a feigned contract, is void. A contract is formed by the consent of the parties established through offer, acceptance, and meeting of the minds on the significant conditions. However, this consent may be vitiated by error, fraud, duress, or adhesion. A contract is null if the requirements for its formation have not been met. Nullity of a contract could be absolute or relative. A contract is absolutely null when it violates a rule of public order (such as when the object of the contract is illicit or immoral). A contract that is absolutely null may not be confirmed. By contrast, a contract is relatively null when it violates a rule intended for the protection of private parties (such as when a party lacked capacity or did not give free consent at the time the contract was made). A contract that is only relatively null may be confirmed. Parties to a contract may stipulate the damages to be recovered in cases of non-performance, improper performance, or delay in performance of the contractual obligation (stipulated or liquidated damages). That stipulation gives rise to a secondary obligation for the purpose of enforcing the principal one. As it is used in Russian law, the term "stipulated (liquidated) damages" does not have the same doctrinal connotation that it has in the common law. This amount of the liquidated damages is not intended as an estimation of the damages owing to one of the parties in the event of a breach of the contract. Rather, it is intended as a form of civil liability for a breach of the contract and as security for its performance. Nullity of the principal obligation renders the stipulated-damages clause null.

Finally, a contract may be extinguished by any one of the following ten methods: performance, impossibility of performance, release-money, offset, novation, remission of debt, fusion of debtor and creditor in one person, an act issued by a state agency, death of a citizen, or liquidation of a legal entity.

c. Analysis of the Law

Article 153 of the Civil Code defines a contract as an agreement between citizens, between legal entities, or between citizens and legal entities aimed at creating, amending, or terminating obligations.⁷¹ An implication of this definition is that a contract must have at least two parties. Article 154(1) distinguishes a contract (a bilateral or multilateral obligation) from a unilateral obligation (which is sometimes referred to in Western literature as a unilateral contract), and Article 154(2) goes on to define a unilateral obligation as one in which the

71 See GK RF art. 153.

will of one of the parties shall be necessary and sufficient to create the obligation. By contrast, Article 154(3) states that the expression of the coordinated will of two (bilateral contract) or more (multilateral contract) parties shall be necessary for the conclusion of a contract. In other words, under Russian law, there is no such thing as a unilateral contract. Unlike a contract which creates obligations for the two or more parties, under Article 155, a unilateral obligation creates obligations for the person who concluded the transaction.

A contract that is concluded under delayed conditions in which the parties made the creation of rights and responsibilities dependent upon circumstances, with regard to which it is unknown whether they will occur, is called a conditional (aleatory) contract under Article 157(1) of the Civil Code. A contract may be concluded in oral or written form under Article 158(1). A written contract that requires notarial certification is known as a written notarial contract. A written contract that does not require notarial certification is regarded under Article 158(1) as a simple written contract. If the law does not specifically stipulate that a contract shall be concluded in a written form, it may be concluded orally according to Article 159(1). Article 161(1) requires that all contracts between legal entities inter se or between a legal entity and a physical person shall be in writing. Notarial certification of written contracts shall be required in instances specified by law or in instances specified by agreement between the parties, even though notarial certification is not required by law for such contracts by Article 163(2). Article 164(1) requires that all contracts involving land and other immovable property shall be subject to registration with the state authorities. Article 164(2) stipulates that specific laws may require that contracts involving certain types of movable property be registered with the state authorities. Failure to comply with the notarial form or with the requirement of state registration shall, pursuant to Article 165(1), render the contract void.

The following contracts shall be deemed void: those that do not conform with the requirements of the law unless the law regards such contract to be voidable (Article 168), those concluded for a purpose which is clearly contrary to the principles of public order or morality (Article 169), and those that are fake or feigned (Article 170). By contrast, the following contracts shall be deemed voidable: those concluded by a person who has been declared as lacking dispositive capacity (Article 171), those concluded by a minor under the age of fourteen (Article 172), those concluded by a legal entity outside the scope of its legal capacity (an *ultra vires* contract) (Article 173), those concluded by a minor between the ages of 14 and 18 (Article 175), those concluded by a person whose dispositive capacity has been lim-

ited by a court (Article 176), those concluded by a person who is incapable of understanding the significance of his actions or of controlling them (Article 177), those concluded under influence of delusion (Article 178), and those concluded under the influence of fraud, coercion, threat, ill-intentioned agreement of the representative of one party with the other party, or a confluence of grave circumstances (Article 179). Invalidity of a part of a contract shall not entail invalidity of its other parts if it may be presupposed that the transaction would have been concluded even without inclusion of its invalid parts (Article 180). The statute of limitations for filing claims on a void contract is ten years from the day when its performance commenced (Article 181(1)). But the statute of limitations prescribed under Article 181(2) for filing claims on a voidable contract is one year from the day when the claimant knew or should have known about the circumstances that serve as grounds for voiding the contract.

Article 309 requires that contracts be performed in good faith and in the proper manner. The term "proper manner" in this context means in accordance with the terms of the contract and the requirements of the law, or in the absence of the latter, in accordance with business custom or other generally accepted requirements. "If an obligation provides for or permits the determination of the day or the time period for its performance, the obligation shall be subject to performance on this day or at any time within this time limit."⁷² If the contract does not specify the time limit for its performance and does not contain conditions which make it possible to define this time limit, it must be performed within a reasonable time after the emergence of the obligation (Article 314(2)). Unless otherwise provided by law, by other legal acts, by the conditions of the contract, or otherwise dictated by its essence, a debtor has the right to perform on obligation ahead of the stipulated time limit (Article 315).

Monetary obligations in the Russian Federation are expressed in rubles which, according to Article 140 of the Civil Code, are the legal tender mandatory for acceptance in the entire territory of the Russian Federation (Article 317(1)). Use of foreign currency or other foreign payment instruments in the Russian Federation is permitted only in the instances specifically provided by law (Article 317(3)).

The rules governing the substitution of parties in a contract and liability for breach of contract are set forth respectively in Chapters 24 (Articles 382–92) and 25 (Articles 393–406) of the Civil Code. Chapter 26 recognizes the following ten grounds for extinction of contract:

72 GK RF art. 314(1).

performance (Article 408), release-money (Article 409), offset (Article 410), novation (Article 414), coincidence of the debtor and creditor in one person (Article 413), remission of debt (Article 415), impossibility of performance (Article 416), act issued by a state agency (Article 417), death of an individual (Article 418), and liquidation of a legal entity (Article 419). Two of these ten forms, release-money and an act issued by a state agency, deserve special mention.

Article 409 of the Civil Code defines "release-money" as the payment of money or transfer of property in place of the performance of a contract. The amount, time limit, and procedure for granting release-money is established by agreement of the parties. Release-money may be agreed to by the parties either at the time of conclusion of the contract (as one of the methods of extinction of the contract) or in the course of its performance (if the parties determine that further performance is either unrealistic or counterproductive). In addition to the two forms of release-money mentioned in Article 409 of the Code, release-money may be granted in other forms, such as the provision of substitute services or performance of other work. Release-money in Article 409 is similar to, but clearly distinguishable from, liquidated damages in Articles 330–33 of the Civil Code. Article 396(3) erroneously equates release-money with liquidated damages. There are three notable and very practical differences between release-money and liquidated damages: under Article 331, agreement on liquidated damages must be in writing, while the agreement on release-money follows the general rule on the form of contracts; under Article 333 of the Code, the amount of liquidated damages may be reduced by a court, while the reduction of release-money by a court is unacceptable; and liquidated damages are payable only in the form of money, while release-money can be granted in forms other than monetary payment.⁷³ It should be noted in passing that the concept of release-money was not included in the 1922 or 1964 Russian Civil Codes or in the FPCivL of 1991.

According to Article 417(1), if as a result of an act of a state agency, the performance of an obligation becomes impossible in full or in part, the obligation is extinguished in full or in the appropriate part. In such a case, the party that suffered damages as a result of this act shall be entitled, under the terms of Articles 13 and 16 of the Civil Code, to seek compensation (tort damages) from the state agency that issued the act. According to Article 417(2), if the act of the state agency on the basis of which the obligation was extinguished is subsequently declared to be invalid in accordance with the procedure estab-

⁷³ See Sadikov, COMMENTARIES, *supra* note 48, at 400–01.

lished by law, the extinguished obligation will be restored, unless otherwise provided by law or contract, or otherwise suggested by the essence of the obligation. In this case, the extinguished obligation will be restored only if the creditor is still interested in its performance.

The concept and conditions of a contract are set forth in Chapter 27 (Articles 420–31) of the Civil Code. Among the notable provisions of this chapter is Article 420, which revisits the general definition of a contract that was previously given in Article 153. Like Article 153, Article 420 defines a contract as “an agreement between two or several parties, whereby civil law rights and obligations are created, modified or extinguished.”⁷⁴ The noble principle of freedom of contract receives a resounding endorsement in Article 421(1), according to which “citizens and legal entities shall be free in concluding a contract.”⁷⁵ This is quickly followed, however, by language which states that “[c]oercion to conclude a contract shall not be permitted except for instances when the duty to conclude a contract has been provided for by the present Code, by a law, or by an obligation voluntarily accepted.”⁷⁶ In a two-paragraph provision, Article 422 restates the principle of the inviolability of a contract as follows: a contract shall correspond to the rules established by law, as well as other legal acts which are mandatory for the parties (imperative norms) and are in effect at the time of its conclusion; and if after the conclusion of a contract a law is adopted which establishes rules that are mandatory for the parties and are different from those which were in effect at the time the contract was concluded, the conditions of the concluded contract will remain in force, except in instances when the law specifically provides that its effect shall extend to relations arising from previously concluded contracts.

The ignoble notion of public contract is spelled out in Article 426. According to Article 426(1), a public contract is one that is “concluded by a commercial organization and establishing its duties relating to the sale of goods, fulfillment of work, or rendering of services which this organization by the character of its activity must effectuate with respect to everyone who has recourse to it (retail trade, public transportation, communication services, electric power supply, medical, hotel services, and so forth)”⁷⁷ This Article further adds that “a commercial organization shall not have the right to prefer one to

74 GK RF art. 420.

75 *Id.* art. 421(1).

76 *Id.* art. 420(1).

77 *Id.* art. 426(1).

others with respect to the conclusion of a public contract except for the instances provided by a law or by other legal acts.”⁷⁸ Article 426(2) states that “[t]he price of goods, work and services, and also other conditions of a public contract, shall be established at a uniform rate for all customers except for instances when the granting of privileges for individual categories of consumers is permitted by a law and other legal acts.”⁷⁹ In the language of Article 426(3), “[a] refusal of a commercial organization when it is possible to grant the respective goods or services to the consumer or to fulfill the respective work for him shall not be permitted.”⁸⁰ If a commercial organization unjustifiably refuses to conclude a public contract, it may be compelled to do so under the combined provisions of Article 426(3) and Article 445(4). To conclude the regulation of public contracts, Article 426(4) adds the following: “In instances provided for by a law the Government of the Russian Federation may issue rules binding upon the parties when concluding and performing public contracts (standard contracts, statutes, et cetera).”⁸¹

Two notable features to a public contract are that it is applicable only to commercial organizations, not to sole proprietors, and that it relates to those commercial activities which by their nature must be offered to all members of the public on equal terms. Under the legal regime of Article 426, a public contract directs a commercial organization not to deny services to anyone who applies for its services, not to offer preferential prices to any one customer over another, and if the requested goods or services are available, not to refuse to conclude a contract with anyone who so requests. If a commercial organization unjustifiably refuses to conclude a contract with a requesting party, the latter may institute a court action to compel it to do so.

The concept of a public contract fundamentally violates the principle of freedom of contract which is articulated in Article 421 and is flatly inconsistent with the spirit of free enterprise. In its full application, it restricts the right of a contracting party to choose his partner; it removes the freedom of the seller of goods to set the price for his goods or to provide discounts to special customers; it disallows, for example, an airline to provide discounted prices to preferred groups or to frequent flyers; and it prohibits a utility company from denying services to anyone who applies for them. The institution of public contract is new to the Russian Civil Code. The purpose of this instru-

78 *Id.*

79 *Id.* art. 426(2).

80 *Id.* art. 426(3).

81 *Id.* art. 426(4).

ment is to protect consumers from discriminatory trade practices. It seems to me, however, that the pendulum has swung too far in the other direction.

The contrasting notions of onerous and gratuitous contracts are defined in Article 423. According to Article 423(1), "a contract under which a party shall receive payment or other reciprocal advantage for which the performance of his obligations shall be onerous."⁸² By contrast, "[a] gratuitous contract shall be one in which one of the parties promises to grant something to the other party without receiving payment or other reciprocal advantage."⁸³ The rule in Article 423(3) is that "a contract shall be presumed to be onerous unless otherwise indicated by law, other legal acts, or the content or essence of the contract."⁸⁴

A contract goes into effect and becomes binding on the parties from the time of its conclusion (Article 425(1)). However, the parties have the right to stipulate that the conditions of the contract concluded by them shall be applicable to their relations arising prior to conclusion of the contract (Article 425(2)).

The definitions of a model contract, accession contract, and preliminary contract are given in Articles 427, 428, and 429 respectively. A contract in favor of a third person, as envisaged in Article 430, is to be understood as one in which the parties have specified that the debtor shall perform, not to the creditor, but to a third party (which is specified or not specified in the contract) which shall have the right to demand performance of the obligation in its favor from the debtor. Unless otherwise provided by law or by the contract itself, from the time the third party expresses to the debtor its intent to exercise its rights under the contract, the parties cannot dissolve or amend the contract concluded by them without the consent of the third party (Article 430(2)). A debtor in a contract in favor of a third party has the right to raise the same objections against claims of the third party as he would have raised against the creditor (Article 430(3)).

The rules governing the interpretation of contracts are set forth in Article 431. In interpreting a contract, a court must take into consideration the literal meaning of the words and expressions contained in it. If the literal meaning of a condition of a contract is ambiguous, the court should attempt to establish the meaning by resorting to comparison with other conditions and with the sense of the contract as a whole. If the court still finds it difficult to establish the meaning

82 *Id.* art. 423(1).

83 *Id.* art. 423(2).

84 *Id.* art. 423(3).

of an ambiguous condition in the contract, it should take into consideration the purpose of the contract in an attempt to clarify the general will of the parties. To do so, the court must take into consideration all circumstances of the contract including, but not limited to, pre-contract negotiations and correspondence, practice established by the mutual relations of the parties, business custom, and subsequent conduct of the parties.

The procedure for concluding contracts is meticulously regulated in Chapter 28 of the Civil Code. Under Article 432(1), "a contract shall be considered to be concluded when agreement regarding all the material conditions of the contract has been reached in the form required in appropriate instances."⁸⁵ Article 432(1) defines "material" conditions as those concerning the object of the contract, conditions which are stated in the law or other legal acts as being significant or necessary for contracts of this type, as well as all those conditions with regard to which, by the expressed wish of one of the parties, agreement shall be reached. To round off the three-part process of concluding a contract, Article 432(2) adds that "[a] contract shall be concluded by means of making an offer (proposal to conclude a contract) by one party and its acceptance (acceptance of the offer) by the other party."⁸⁶ In other words, the conclusion of a contract requires three interrelated steps: an offer, an acceptance, and an agreement on the significant conditions of the contract.

According to Article 433(1), the time of conclusion of a contract is deemed to be the time of receipt of the acceptance by the party which made the offer. However, if by law the transfer of property is also necessary for the conclusion of the contract, the contract shall be deemed to be concluded at the time of the transfer (Article 433(2)). In addition, a contract which is subject to state registration is considered to be concluded at the time of its registration, unless otherwise provided by law (Article 433(3)). With regard to the form of contract, the rule in Article 434 of the Civil Code is that a contract may be concluded in the form specified for concluding transactions, provided the law does not specify a specific form for contracts of a given type. If the parties agreed to conclude a contract in a given form, it is considered to be concluded after it has been given the agreed form, even though the law does not require such form for contracts of the given type. A contract in written form may be concluded by means of compilation of one document, signed by the parties, as well as by means of exchange of documents through the mail, telegraph, teletype, tele-

85 *Id.* art. 432(1).

86 *Id.* art. 432(2).

phone, electronic, or other means of communication which make it possible to reliably determine that the document originated from a party to the contract.

The concept and conditions of an offer are regulated in Articles 435–37. Article 435(1) defines an offer as a proposal addressed to one or several specific persons, which is adequately specific and expresses the intention of the person making the offer to consider himself as having concluded the contract with the addressee who accepts the proposal. An offer must contain the essential conditions of the contract. Article 435(2) notes that an offer binds the person who sent it starting from the time of its receipt by the addressee. If the notice of recall of an offer arrives prior to, or at the same time as, the offer itself, the offer shall be considered as not having been received. The rule on the irrevocability of an offer is set forth in the following provision of Article 436: “An offer received by the addressee may not be revoked within the period established for its acceptance unless otherwise stipulated in the offer itself or otherwise indicated by the essence of the proposal or the situation in which it was made.”⁸⁷ The rule governing public offers is articulated in Article 437. It provides that advertisements and other proposals addressed to an indefinite group of persons are viewed as an invitation to make an offer, unless specifically stated otherwise in the proposal; a proposal which contains all the essential conditions of the contract and from which one may perceive the will of the person making the proposal to conclude the contract on the conditions specified in the proposal with anyone who responds, is considered to be an offer (public offer).

Acceptance is understood to be the response of the person to whom the offer was addressed. An acceptance is complete and unconditional according to Article 438(1). According to Article 438(2), silence is not considered to be an acceptance unless otherwise indicated by law, business custom, or previous business relations of the parties. Performance by the person receiving the offer, within the time limit specified for its acceptance, of actions directed at fulfillment of the conditions of the contract stipulated in it (such as shipment of goods, provision of services, performance of work, and payment of appropriate sum) is considered to be an acceptance, unless otherwise specified by law, other legal acts, or indicated in the offer (Article 438(3)). If the notice of recall of acceptance is received by the person making the offer prior to the acceptance or simultaneously with it, the acceptance will be considered as not having been received (Article 439). When an offer stipulates a time limit for ac-

87 *Id.* art. 436.

ceptance, the contract is considered concluded if the acceptance is received by the person making the offer within the time limit specified (Article 440). When a written offer does not specify the time limit for acceptance, the contract is considered to be concluded if the acceptance is received by the person making the offer prior to expiration of the time limit specified by law or other legal acts, and if such time limit is not specified, then within the time limit normally necessary for this purpose (Article 441(1)). When an offer is made verbally without an indication of the time limit for acceptance, the contract is considered to be concluded if the other party immediately announces its acceptance (Article 441(2)).

The rules governing acceptance received with delay or acceptance on other terms are set forth in Articles 442 and 443 respectively. According to Article 442, in cases when notice of acceptance which was sent on time is received with delay, the acceptance shall not be considered delayed if the party making the offer does not immediately notify the other party of the receipt of the acceptance with delay. If the party making the offer immediately notifies the other party of acceptance of its acceptance, received with delay, the contract shall be considered concluded. According to Article 443, a response regarding willingness to conclude a contract on conditions other than those proposed in the offer does not constitute acceptance. Such response is considered to be a rejection of the acceptance, and at the same time a new offer. Under Article 444, if the contract does not specify the place of its conclusion, the contract is considered to be concluded at the place of residence of the citizen or place of location of the legal entity that made the offer. The procedure for concluding a contract by public bids is regulated in Articles 447-49.

The grounds and procedure for the amendment and dissolution of contracts are regulated by Articles 450-53. The general rule is that, unless law or the contract stipulates otherwise, a contract may be amended or dissolved by agreement of the parties (Article 450(1)). At the demand of one of the parties, a contract can be amended or dissolved by a court if there is significant breach of the contract by the other party (Article 450(2)). A "material breach" is considered to be a breach of the contract by one of the parties which entails such losses for the other party that it is deprived to a significant degree of that which it had a right to expect in concluding the contract (Article 450(2)). Article 451 also recognizes a material change in circumstances as a ground for the amendment or dissolution of a contract, unless otherwise stipulated by the contract or otherwise suggested by the essence of the contract. According to Article 451(1), a change in circumstances is considered significant if the changes are such that, if

the parties had reasonably foreseen them, they would not have concluded the contract, or would have concluded the contract under significantly different conditions. Unless law or the contract otherwise provides, agreement on the amendment or dissolution of a contract must be concluded in the same form as the contract itself (Article 452(2)). Upon amending a contract, the obligations of the parties are retained in the amended form. By contrast, upon dissolution of a contract, the obligations of the parties are extinguished (Articles 453(1) and (2)). If the ground for amending or dissolving the contract was a significant breach of the contract by one of the parties, the other party has the right to demand compensation of the losses suffered by it as a result of the amendment or dissolution of the contract (Article 453(5)).

2. Kazakstan (Civil Code Draft Part Two)

Following the Russian Civil Code, the Kazak Civil Code's law of contract is divided into two sections—*lex generalis* and *lex specialis*. The general rules relating to all contracts, nominate as well as innominate, are embodied in Part One of the Civil Code; the special rules governing individual types of nominate contracts are contained in Part Two. Both in terms of the types and numbers of nominate contracts, the Kazak Civil Code mimics the Russian Civil Code. The contract theory of the Kazak Civil Code follows that of the Russian Civil Code. In short, there are no substantial differences between the modern Kazak and Russian contract laws.⁸⁸

VII. FINALE: RUSSIA AND KAZAKSTAN AS MODERN LABORATORIES FOR LEGAL EXPERIMENTATION

With the demise of Soviet communism, the disintegration of the Soviet Union into fifteen independent republics in 1991, and the decision by each one of these newly independent states to abandon Soviet socialism in favor of the free enterprise system, the former Soviet republics became the new frontier for social, economic, and legal transplantations. It was immediately evident that the proposed new economic system could not be mounted on the old Soviet socialist legal system. A decision was then made to modernize the legal systems of these countries, especially the commercial laws. By early 1992, the CIS republics had a clear vision of what their new post-Soviet legal

⁸⁸ For a synopsis of the modern Kazak law of contract under the 1994 Kazak Civil Code, see I.U.G. BASIN, SDELKI [Transactions] (1996).

systems would look like, and the process of legal reform was launched in mid-1992.

In designing a new legal system for the respective new republics, the law reformers made a principled decision not to sever the umbilical cord linking the new legal order with the Soviet past. The delicate task of deciding which elements of pre-1985 Soviet law should be retained in the post-Soviet legal system fell to a group of indigenous legal scholars who themselves were deeply rooted in the Soviet socialist legal culture. To help them accomplish their goals, they sought the assistance of Western legal experts, who descended on these countries from different systems within the Western legal tradition. The fact that these volunteer Western legal consultants came from both the civil law and common law systems, fueled by the fact that each one of these Western consultants wanted to sell the new client states on the superiority of their respective native legal systems, turned the newly independent states into the new battleground for direct confrontation between the continental European civil law system and the Anglo-American common law tradition. This meant that the task before the post-Soviet law reformers became threefold: Which elements of pre-1985 Soviet socialist law should be retained in the new post-Soviet legal system? How much and what exactly can be borrowed from the continental European legal systems to enrich Russia's new legal system? And lastly, if it were decided that the character of the new post-Soviet legal system should be that of continental European civil law, how much and which elements specifically can be borrowed from the Anglo-American common law that would blend in with the civil law backdrop of Russia's new legal system?

By virtue of their geographic size and economic importance, Russia and Kazakstan were positioned at the forefront of legal experimentation in the CIS republics. A close analysis of the law reform efforts in these two countries reveals four inter-connected trends: the creeping Westernization of the Russian Civil Code, the blanket reception of the Russian Civil Code in Kazakstan, the constitutionalization of the Civil Codes of Russia and Kazakstan, and the direct influence of the Russian Civil Code on the civil codes of all the other CIS republics, notably Kyrgyzstan. Let us examine each one of these trends in greater detail.

A. The Creeping Westernization of the Russian Civil Code

The Westernization of post-Soviet Russian Civil Code was piecemeal and gradual, rather than wholesale and sudden. The incremental reception of Western ideas into modern Russian civil law started

with the 1991 amendments to the FPCivL and the subsequent incorporation of the 1991 FPCivL into Russian law.

Even though the drafting of the Russian Civil Code of 1994 was influenced by five different sources,⁸⁹ the end result is a Code that is unmistakably Western in character. Its internal divisions, vocabulary, legal fictions, and substantive rules are characteristically Western. But despite its Western character and orientation, the Code of 1994 did not sever the umbilical cord linking it with the pre-1991 Soviet socialist legal tradition. Some benign elements of this latter legal tradition are given a new lease on life in the new Code. Because any law is only as good as the people who enforce it, and since the current crop of Russian lawyers and judges are products of the Soviet legal system, it can be expected that the life of the Russian Civil Code of 1994 for quite sometime will manifest some of the traditional bad habits of pre-1991 Soviet law, such as frequent changes in the law, benign neglect of the law on the books by those who are called upon to enforce it, and uneven application by the courts of the law to similar situations.

B. The Wholesale Reception of the Russian Civil Code in Kazakhstan

The Russian Civil Code of 1994 quickly became the model for the post-Soviet civil codes of the other CIS republics, including the Republic of Kazakhstan. The code drafters in Kazakhstan decided not to reinvent the wheel, but rather to modify the Russian Civil Code of 1994 for use in post-Soviet Kazakhstan. Consequently, when the Russian Civil code arrived in Kazakhstan, it was subjected to a cleansing process that is analogous to the sacrament of baptism in the Roman Catholic Church. The purpose of this indigenization process was to cleanse the imported code of any Russian original sins that it may have and to adapt it to the local realities of Kazakhstan. The end result of this process is that the Kazak Civil Code is a reconstructed version of the Russian Civil Code.

Most of the modifications of the Russian Civil Code by the Kazak Civil Code drafters relate to the form of the Code itself, that is, to its internal divisions, the consolidation of several individual articles in the Russian Civil Code into mega-articles in the Kazak Civil Code, and incorporating into the civil code pedestrian details that are left to the respective subordinate legislations by the Russian Civil Code. In Part IV of this study, I noted a few differences in the architecture (internal divisions) of the Russian and Kazak civil codes.

89 See discussion *supra* Part III.A.

Another example of the differences between the external forms of the two civil codes is demonstrated by the provisions of Chapter 7 of the Russian Civil Code entitled "Securities," and those of the corresponding Chapter 3(2) of the Kazak Civil Code, which is also entitled "Securities." The drafters of the Russian Civil Code, in restating the rules on securities regulation in Chapter 7, decided to restate the general rules in the Code, leaving the minute details to the separate subordinate law on securities. Thus, Chapter 7 of the Russian Civil Code contains only eight articles (Articles 142–49). By contrast, in an attempt to be different from the Russian Code, the Kazak Civil Code's Chapter 3(2) decided to incorporate details that properly belong to a separate law on securities regulation. Thus, this section of the Kazak Civil Code contains twelve individual articles on securities law (Articles 129 through 140). Soon after the Kazak Civil Code went into effect, the makers of the Code realized their folly in this respect and quickly deleted three of the articles (Articles 137, 138, and 140) in Chapter 3(2). As a result, the space that was originally assigned to Articles 137, 138, and 140 in the 1994 is now blank. These three articles were moved into the separate law on securities regulation. Six of the remaining articles of this section of the Kazak Civil Code were subsequently amended on July 11, 1997, in the direction of making them less detailed in their provisions.

Some of the differences between these two civil codes do relate, however, to the substance of the codes. Thus, for example, the absolutism theory of the supremacy clause of the Russian Civil Code (according to which priority must be given to the Civil Code in the event of a conflict between a Code provision and a provision of any other civil legislation) was transformed into a relativism theory (according to which in the event of a conflict between a Civil Code provision and the provision of any other civil legislation, with the notable exception of banking legislation, priority shall be given to the Civil Code) to reflect the political clout of the banking industry in Kazakhstan. As a result of such adaptation of the supremacy clause, the provisions of the Kazak Civil Code are superior to those of all other laws regulating civil law relations, with the exception of banking legislations.⁹⁰ As a result of the amendments of March 2, 1998, the Kazak Civil Code has partially restricted the blanket exemption that it gave to banking legislation from the supremacy effect of the Civil Code. Another manifestation of the independent thinking of the Kazak Civil Code may be found in the Code's section dealing with the law of enterprise organi-

90 See discussion *supra* Part VI.A.

zation. Here the vocabulary of the Kazak Civil Code is distinctly different from that of the Russian Civil Code.⁹¹

Yet one other point of difference between the two codes is in their style. The language of the Russian Civil Code is precise and the style is elegant. In parts it reads like a literary masterpiece. By contrast, the language of the Kazak Civil Code is verbose. The sections of the Kazak Civil Code dealing with the law of enterprise organization is replete with terminological inconsistencies.⁹² Some passages of the Kazak Civil Code are so lacking in style that they read like sloppy translations from the Kazak language into Russian. In reality, the Kazak Civil Code was originally drafted in Russian and later translated into the country's state language, that is, the Kazak language. Notwithstanding these benign detours from the Russian Code, a juxtaposition of the provisions of the two codes will reveal that the Kazak Civil Code of 1994 is unmistakably a touched up version of the Russian Code of 1994.

C. *The Constitutionalization of the Civil Code*

To a student of American constitutional law, the contours of the Russian Civil Code of 1994 resemble that of a constitution rather than a civil code. Like the United States Constitution, the Russian Civil Code of 1994 contains familiar constitutional provisions such as a supremacy clause,⁹³ an interstate commerce clause,⁹⁴ an equal protection clause,⁹⁵ a takings clause,⁹⁶ a delegation of powers clause,⁹⁷ and a

91 See discussion *supra* Part VI.D.

92 For this writer's criticism of the provisions of the 1994 Kazak Civil Code dealing with the law of enterprise organization, see Osakwe, *supra* note 39, at 3.

93 For a discussion of the supremacy clause in the Russian Civil Code of 1994, see *supra* Part VI.A.

94 For a discussion of the interstate commerce clause in the Russian Civil Code of 1994, see *supra* Part VI.C.

95 For a discussion of the equal protection clause in the Russian Civil Code of 1994, see *supra* Part II.D.

96 For a discussion of the takings clause in the Russian Civil Code, see *supra* Part VI.B.

97 The delegation of powers doctrine is embodied in Article 3 of the Russian Civil Code of 1994. According to the provision of Article 3(2) of the Russian Civil Code, civil law relations shall be regulated primarily by statute, *i.e.*, by the Civil Code as well as by other federal laws (statutes enacted by the federal parliament) that are consistent with the Civil Code. However, Article 3(3) delegates to the President of the Russian Federation the power to regulate civil law relations as long as any decrees issued by the President on such matters are consistent with the Civil Code and other federal laws dealing with the same subject matter. Additionally, Article 3(4) delegates to other executive branch agencies the power to regulate civil law relations as long as the regulations issued by such agencies are consistent with the Civil Code, other federal

clause on the allocation of powers⁹⁸ between the federal and state governments in language that is reminiscent of the Tenth Amendment to the U.S. Constitution.⁹⁹ The latter five clauses of the foregoing six provisions of the Russian Civil Code replicate the corresponding language in the Russian Constitution of 1993 and, thus, can be said to be solidly founded in the Russian Constitution. In other words, they are mere transpositions into the Civil Code of the corresponding text of the Russian Constitution of 1993. The same cannot be said for the supremacy clause of the Russian Civil Code of 1994. What is most remarkable about the Code's supremacy clause is that it is not supported by any explicit language of the Russian Constitution, but rather bases its constitutionality on the penumbras of Article 71 of the Constitution. It is this one provision of the Russian Civil Code of 1994 that truly transforms the Code into the *de facto* economic constitution of post-Soviet Russia. Essentially because of its supremacy clause, the Code functions like the penultimate supreme economic law of the land. Put differently, in the regulation of private law relations, the Civil Code of 1994 yields only to the Russian Constitution of 1993, thanks to its supremacy clause.

By far the most significant contribution of the Russian Civil Code to the history of European civil codes is the constitutionalization of the Civil Code. By constitutionalization of the Civil Code I mean the elevation of the Civil Code to the status of a quasi-constitution, giving supremacy to its norms over the norms of any other laws that may be in conflict with it. Thus, for example, under this rule, if a provision of the law on bankruptcy conflicts with a peremptory norm of the Civil Code, the former must yield. Similarly, if a provision of the law on

laws, and the decrees of the President dealing with the same subject matter. In other words, under the arrangement set forth in Article 3 of the Russian Civil Code, the power to regulate civil law relations in the Russian Federation is vested in the Russian federal parliament, which exercises such authority through the enactment of the Civil Code. By virtue of delegation from the Russian federal parliament, the power to regulate civil law relations is also granted to the President of the Russian Federation and to the other executive agencies of the federal government, with the caveat that the exercise of such delegated powers by the President and the regulations promulgated by the other federal executive agencies are consistent with the Civil Code and other statutes that regulate civil law relations.

98 The clause on the allocation of powers between the federal and state Governments is embodied in Article 3(1) of the Russian Civil Code. Citing the Constitution of the Russian Federation, Article 3(1) of the Russian Civil Code states that the regulation of civil law relations shall fall within the exclusive jurisdiction of the federal Government. For a more detailed discussion of this principle of the Russian Civil Code, see *supra* Part VI.A.

99 U.S. CONST. amend. X.

mortgages conflicts with a mandatory rule of the Code, the Code shall take precedence. Under the Code, there are no exceptions to the supremacy clause in Article 3. This phenomenon is unique to the civil codes of the CIS republics—it is unprecedented in Western law. To put it more bluntly, it is alien to the continental European civil law tradition. It reflects the political authority of the civilists (civil law scholars) as an interest group in the CIS republics.

The justification for this rule was summarized for me by one of the drafters of the Russian Civil Code in words that boil down to the following: We fought hard for the Civil Code; if it is to serve as the legal framework for a successful transition to a market economy, it must not be subverted by any other laws, the drafting of which we have no control over; if any other laws wish to change a rule in the Civil Code, they must do so frontally and not through the back door; any frontal attempts to change the Civil Code will come under our scrutiny and careful consideration to make sure that the gains of the Civil Code are not reversed. In other words, the drafters of the Civil Code felt that the only way that “their” Code would remain unaffected by the vicissitudes of the Russian political process was to elevate it to the level of a sacred cow. They did so, knowing quite well that it is not in the tradition of the continental European civil law system to grant such quasi-constitutional status to the Civil Code. One of the drafters of the Russian Civil Code opined that the constitutionalization of the Code will go down in history as the Russian contribution to the civil law tradition.

To another member of the Civil Code working group I posed the following question: Since the supremacy clause in Article 3 of the Civil Code does not have any explicit support in the Russian Constitution of 1993, what would prevent the Russian parliament, sometime in the future, from enacting civil legislation that is inconsistent with the Civil Code? His response to me was equally blunt—he said to me something along these lines: As long as we have the power to influence the President’s decision in the matter, we will advise him to veto any such legislation. In other words, the supremacy clause in Article 3 of the 1994 Russian Civil Code is enforced through two mechanisms over which the Russian civilists have some control. Before a draft law is sent up to parliament to commence the legislative process, it is screened by the government for consistency with other laws on the books; after a law is passed by the parliament, it is sent up to the President for his signature and promulgation. On the advice of the Russian watchdog civilists, the government of the Russian Federation will not submit to parliament any draft law that is inconsistent with the Civil Code. Similarly, at the prodding of the civilists, many of whom

serve as legal advisors to the President, the latter will veto any law that does violence to the principle articulated in Article 3 of the Code.

D. The Influence of the Russian Civil Code on the Civil Codes of the Other CIS Republics: A Case Study of Kyrgyzstan

In matters of law reform, post-Soviet Kazakstan is an intellectual colony of post-Soviet Russia in the sense that many Russian law reform experiments are willingly and freely replicated in Kazakstan. Kazakstan, however, is not alone in this situation. Other CIS republics find themselves in the same predicament. Prominent among the other CIS republics that willingly copy the law reform experiments in Moscow is Kyrgyzstan—Kazakstan's southeastern neighboring state.¹⁰⁰ Part One of the Civil Code of the Kyrgyz Republic, which was promulgated in 1996, was modeled after Part One of the Civil Code of the Russian Federation. Like Kazakstan, Kyrgyzstan elected to phase in its post-Soviet Civil Code in two parts, not in three parts as is the case in Russia. Thus, Part Two of the Civil Code of Kyrgyzstan consolidates Parts Two and Three of the Russian Civil Code. Part Two of the Civil Code of Kyrgyzstan was adopted by parliament and signed into law by the President of Kyrgyzstan in 1997. Like the Kazak Civil Code, Parts One and Two of the Civil Code of Kyrgyzstan deviate from the Russian Civil Code on a few insignificant points. However, in the final analysis, there is no denying the fact that the post-Soviet Civil Code of Kyrgyzstan is a reconstructed version of the Russian prototype.

Russian civilists were among the group of foreign consultants that advised the drafters of the Kyrgyz Civil Code. In fact, several chapters of the First Part of the Code were drafted by Russian civilists who were retained by the Kyrgyz Civil Code Working Group (the group responsible for coordinating the drafting of the Code) to prepare the first draft of several chapters of the Code as well as to serve as commentators on the drafts of other chapters of the Kyrgyz Code that were drafted by non-Russian foreign consultants. Typically, the drafters had before them copies of both the Russian Civil Code of 1994 and the Kazak Civil Code of 1994. On many of the points on which the Kazak Code deviated from the Russian Code, the drafters of the Kyrgyz Code made the principled decision to follow the Russian Civil Code rule. In this sense, one could say that the Kyrgyz Civil Code is closer to the Russian Civil Code than is the Kazak Civil Code. The

100 A comparison of the laws of enterprise organization under the post-Soviet Civil Codes of Russia, Kazakstan, and Kyrgystan may be found in Christopher Osakwe, *Enterprise Organization Under the Civil Codes of Russia, Kazakstan and Kyrgystan: A Biopsy of Commercial Law Reforms*, 45 INT'L PRACTITIONER'S NOTEBOOK 58-59.

close affinity between the Kyrgyz and Russian Civil Codes is particularly evident in the sections of the respective codes dealing with the law of enterprise organization.¹⁰¹

VIII. LAW ON THE BOOKS VERSUS LAW IN ACTION: THE PATHOLOGY OF THE TWO CIVIL CODES

Judged by the law on the books, the post-Soviet civil codes of Russia and Kazakstan rank among the great civil codes of the modern world. They creatively transposed to Russia and Kazakstan respectively ideas that were selectively borrowed from the other great civil and commercial codes of the contemporary world. They picked the best ideas from each foreign prototype and blended them with local institutions to produce a *melange parfait*. However, even though the transplantation operation was successful, it is uncertain whether the transplanted ideas are compatible with the tissues of the host legal systems. As in any medical transplantation, if there is incompatibility between the borrowed foreign ideas (transplanted organs) and the legal environment into which they were transplanted (host body), one of two things will happen, depending on the degree of incompatibility: if the incompatibility is substantial, the host body will reject the transplanted organs right away; if the incompatibility is relative, the host body will partially accept the transplanted organs, but refuse to integrate fully such foreign organs into its biological system. In the latter instance, the transplanted organs will be condemned to the artificial existence of not actually becoming biologically integrated into the organic life of the host body. Such partial incompatibility is typically correctable with the passage of time and thus results only in a temporary dysfunction. A post-surgery examination indicates that the degree of rejection of the Russian and Kazak Civil Codes in the respective host bodies is relative, not substantial.

In the case of the Civil Codes of Russia and Kazakstan, it is apparent that there is some alienation between the respective codes and the societies in which they operate. In other words, it is evident even to the untutored observer that there is a wide gap between the *written code* (law on the books) and the *living code* (law in action). However, only a pathology of the codes will reveal the exact degree of alienation between the respective codes and the individual societies. To assist this pathological examination, the following questions should be asked of the respective Civil Codes: How familiar is the average citizen with the Civil Code? How much faith does the average citizen have in

101 The semantic differences between the laws of enterprise organization under the Russian and Kazak Civil Codes are explored *supra* Part VI.D.

the Civil Code? How willing is the average citizen to govern his business and private affairs by the rules of the Civil Code? How knowledgeable are the judges about the law that is embodied in the Civil Code? How willing, in the event of a civil law dispute, is the average citizen to seek solutions within the framework of the Civil Code? How effective is the mechanism for the enforcement of judgments rendered under the Civil Code? What guarantee does the average citizen or businessmen have that the present provisions of the Civil Code will not be subjected to frequent changes in the foreseeable future? In other words, how stable is the Civil Code itself?

A pathology of the two Civil Codes reveals that both codes are suffering from a systemic dysfunction which is curable with the passage of time. The symptoms of the dysfunction are threefold. The two Codes are operating in legal systems which lack a legal culture, both Civil Codes live an artificial life that is analogous to that of a potted plant, and the Kazak Civil Code is afflicted with an acute case of pathological instability. A biopsy of the Russian Code also conclusively reveals, however, the heartening fact that the Civil Code reforms that were introduced between 1991 and 1997 are irreversible even if the present reformist President Boris Yeltsin is eventually replaced by a communist party President. The roots of the 1994 Russian Civil Code have grown too deep into the Russian social psyche to be readily destroyed. On this latter point, the preliminary results of the biopsy of the Kazak Civil Code are inconclusive. Let us examine each one of these phenomena in detail.

A. *A Legal System Without a Legal Culture*

The 1994 Civil Codes of Russia and Kazakstan were designed for legal systems with a sophisticated legal culture. Absent such a backdrop, these Civil Codes will not be able to perform to their fullest capacity. The legal systems of post-Soviet Russia and Kazakstan lack even the semblance of an advanced legal culture. The absence of a legal culture is more pronounced in Kazakstan than it is in Russia. In my opinion, the six elements of a legal culture are the following: supremacy of law, sanctity of contracts, general access to legal information (transparency of the legislative process, prompt and full publication of all laws, and freedom of information), legal literacy among the general population, universal respect for the role of lawyers as the protectors of the rights of citizens, and stability of the laws.

In post-Soviet Russia, there are signs that these six elements are beginning to sprout. However, they are far from becoming permanent fixtures of the country's new legal system. By and large, the aver-

age Russian citizen still prefers to resolve legal disputes either through the political process or by other extra-legal means. The Russian legal system still harbors deep distrust for the courts and still nurtures disdain for lawyers, whom a substantial segment of the Russian population continues to regard as social parasites. The average Russian citizen still thinks of the law in terms of the criminal justice system rather than in terms of the civil justice system. The average Russian citizen's notion of a lawyer is that of the procurator (criminal prosecutor) and the criminal investigator, not that of a lawyer in private civil law practice. The typical Russian citizen is more familiar with the Criminal Code than he is with the Civil Code. If you ask the average Russian party to a written contract whether he had carefully studied the provisions of the contract which he had just signed, his response will most probably be "NO!" This is so because in Russian contract practice, negotiation of the terms of a contract typically starts after the contract has been signed. In other words, the average Russian citizen does not base his routine personal or business decisions on the law, especially on the Civil Code.

I do believe, however, that with the passage of time, the Russian legal system will acquire the level of legal culture that will enable it to become a full fledged member of the Western legal family. In the meantime, the uncontrovertible diagnosis is that the post-Soviet Civil Code of Russia operates in a legal system that lacks a sophisticated legal culture. This makes it very difficult for some of the innovative ideas in the Civil Code to permeate the consciousness of the average Russian citizen. Because the state of legal culture in Kazakstan is more primitive than it is in Russia, Kazakstan will need more time in order to attain the level of legal culture needed to back up its avant-garde Civil Code of 1994.

B. The Russian and Kazak Civil Codes as Potted Plants

The transplantation operation by which Western legal ideas were transposed into the legal environment of Russia and Kazakstan, by any standard of measurement, can be deemed successful. However, the critical process of adapting these civil codes to the new environment is proving to be much more difficult. Consequently, these two civil codes are living an artificial life that can be compared to that of a potted plant. They are totally alienated from their biological surrounding. They decorate and beautify their new surrounding, but are not biologically blended in with the ecological system of their new host countries. The respective societies tolerate these civil codes and treat them as a convenient nuisance which can be set aside at any

opportune moment. At best, the average Russian or Kazak citizen treats the respective 1994 civil codes with dignified but benign neglect.

A closer analysis of the situation of both civil codes reveals that the alienation of the Kazak Civil Code from its new environment is deeper than that of the Russian Civil Code from the Russian society. This difference manifests itself in two ways. The average Russian citizen knows much more about the Russian Civil Code than does the average Kazak citizen about the Kazak Civil Code, and the trust level of the average Russian citizen in the Russian Code, albeit low by Western standards, is much higher than that of the average Kazak citizen in the Kazak Civil Code. To the average Kazak citizen, the Civil Code in particular, and private law in general, is an exotic idea that was imported from Western law. Prior to 1991, to the ordinary Kazak citizen all law was public law and there was no room for private law. By and large, that attitude towards the law has not changed in post-Soviet Kazakhstan. The average Kazak citizen's distrust of law in general is even more pronounced when it comes to his attitude towards a private law code such as the Civil Code. To him, the country's new Civil Code is like a candle in the wind—it blows in whichever direction the political authorities want it to blow. Frequent changes in the provisions of the Kazak Civil Code tend to buttress that public opinion of the Code.

This leads me to the conclusion that even though both the Russian and Kazak Civil Codes live the lives of potted plants, the imaginary Russian flower pot at least contains natural plants, whereas the Kazak flower pot contains artificial plants. It seems to me that the utility value of the Russian potted natural plants to the Russian society is much more than that of the Kazak potted artificial plants to the post-Soviet Kazak society. Distrust for law and lawyers is more deeply rooted in Kazakhstan than it is in Russia. The propensity to seek political as well as other extra-legal solutions to legal problems is more ingrained in the Kazak society than it is in Russia. The level of legal literacy in Kazakhstan is much lower than it is in Russia. Consequently, it seems to me that the Kazak potted plant will need much more time in order to be transformed into the living law of Kazakhstan.

C. *The Pathological Instability of the Kazak Civil Code*

A biopsy of the Kazak Civil Code reveals that it is suffering from some form of dysfunction, which I would diagnose as an acute case of pathological instability. This is evidenced by the fact that during the first thirty-one-month period of its troubled existence (*i.e.*, from December 27, 1994 through July 11, 1997), ninety-two articles of the Ka-

zak Civil Code have been subjected to varying degrees of amendments. As if this was not enough, on March 2, 1998, a total of 106 new amendments were introduced into the Civil Code. This yields a combined total of 198 amendments in thirty-eight months. This figure does not reflect the fact that certain articles of the Civil Code were subjected to amendments in more than one place. In sum, this comes to an average of five amendments per calendar month. Any law that changes that often is not worth the paper that it is written on. Some of the amendments are minor (such as changing the term "charter fund" to "charter capital," "percentage" to "interest," "financial resources" to "money," "profit" to "net income"). But other changes are major, such as replacing the text of an entire section (*e.g.*, the entire text of Chapter 18, Section 4 was replaced with a new text) or deleting an entire article (*e.g.*, the amendments of July 11, 1997 deleted entirely Articles 137, 138, and 140).

Possible explanations for the frequency of the changes in the Kazak Civil Code are many: the drafters were in such a hurry to complete their work that they made several technical mistakes that needed to be corrected soon after the Code was enacted; some of the provisions of the Code were not carefully thought through at first and the drafters were having a second thought about them soon after the Code was promulgated; and interest groups that had lost the fight to reflect their viewpoints in the Code as originally enacted in 1994 were winning the post-enactment battle and were beginning to roll back those provisions with which they disagreed. The fact that the overwhelming majority of the 198 amendments that had been introduced into the Civil Code at the time of this writing dealt with the provisions on banking law, and that most of these amendments were initiated by the National Bank of Kazakhstan (NBK), clearly shows the unhappiness of the NBK with the 1994 text of the Civil Code. Between December 1994 and March 1998, the movement to change the Civil Code was spearheaded by two financial institutions: the NBK and the National Securities Commission (the Kazak equivalent of the Securities and Exchange Commission in the United States). One thing that can be said with some certainty is that there is considerable dissatisfaction within the Kazak commercial law community with the Civil Code of 1994, and this interest group will not give up its efforts to change the Code until it feels that it has purged it of all provisions with which it is in disagreement. This means that we have not yet seen the end of waves of amendments to the Code, especially to its commercial law provisions.

Ironically, virtually all of the 198 amendments that were introduced into the Kazak Civil Code between December 27, 1994, and

March 2, 1998 affect the provisions on which the Code had deviated from the Russian prototype, and the amendments themselves have now forced the Code to return to the original text in the Russian Civil Code from which they detoured. In other words, thanks to these creeping amendments to the Kazak Code, the textual differences between the Russian and Kazak Civil Codes of 1994 have been substantially narrowed. In stark contrast to the rolling stone that the Kazak Civil Code seems to resemble, the Russian Civil Code of 1994 looks like a solid rock. During the same period of time the Russian Civil Code had undergone only three amendments—to Articles 64 and 185 in Part One, and Article 855 in Part Two.

D. The Irreversibility of the Russian Civil Code Reforms

President Boris Yeltsin will go down in history as the father of the Russian Civil Code of 1994. With the passage of time the Russian Civil Code will, with a feeling of hindsight gratitude, be referred to as the Yeltsin Code, just in the same spirit that the French fondly call their Civil Code the Napoleonic Code. In every sense of the word, Yeltsin has turned out to be the benevolent lawgiver for Russia as Napoleon was for France. The Russian Code exudes the economic philosophy of the President himself. Even though at the present time the Code lives the life of a potted plant in Russia, and notwithstanding the fact that the modern Russian legal system lacks a sophisticated legal culture, the undeniable fact is that the process of assimilation of the Code into the Russian legal consciousness is proceeding at a slow but steady pace. The faith of the Russian citizen in the Civil Code is growing slowly but steadily. The gains of the Civil Code reforms of 1991–1994 are trickling down to the average Russian citizen. The Russian judges are interpreting the provisions of the Civil Code with demonstrable precision and growing sophistication. A large segment has discovered the benefits of the tort provisions of the Civil Code dealing with the protection of a citizen's honor, dignity, and business reputation. More and more, ordinary citizens are channeling their entrepreneurial activities through the various forms of enterprise organization provided in the Civil Code. In light of these encouraging developments, it is my firm belief that the 1994 Code will survive the departure of President Yeltsin from the political scene and that the reforms of 1991–1994 are at the point in their evolution where it will be virtually impossible to reverse them. There is little chance that Russia will willingly return to the legal regime of the Russian Civil Code of 1964.