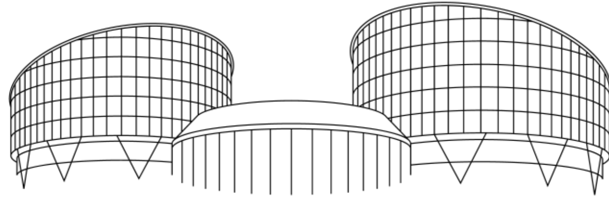

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF KOTOV v. RUSSIA

(Application no. 54522/00)

JUDGMENT

STRASBOURG

3 April 2012

This judgment is final but may be subject to editorial revision.

In the case of Kotov v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Josep Casadevall,
Corneliu Bîrsan,
Peer Lorenzen,
Karel Jungwiert,
Elisabet Fura,
Alvina Gyulumyan,
Egbert Myjer,
Danutė Jočienė,
Dragoljub Popović,
Giorgio Malinverni,
George Nicolaou,
Ann Power-Forde,
Kristina Pardalos,
Guido Raimondi, *judges*,
Andrei Bushev, *ad hoc judge*,

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 12 January and 23 July 2011 and on 22 February 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 54522/00) against the Russian Federation lodged with the European Court of Human Rights under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Vladimir Mikhaylovich Kotov ("the applicant"), on 17 November 1999.

2. In the proceedings before the Chamber the applicant was granted leave for self-representation. In the proceedings before the Grand Chamber the applicant was granted legal aid. He was represented by Ms Evans and Mr Bowring, lawyers practising in the United Kingdom, and Mr Khasanov, a lawyer practising in Russia.

3. The Russian Government ("the Government") were initially represented by Mr P. Laptev, the former representative of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

4. The applicant alleged, in particular, that it had been impossible for him to obtain the effective repayment of money owed to him in the context of the liquidation of a private bank.

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (former Article 27 § 1 of the Convention, now Article 26) was constituted as provided in Rule 26 § 1.

6. On 4 May 2006 the application was declared partly admissible by the Chamber. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

7. On 14 January 2010 a Chamber of the first Section, composed of the following judges: Christos Rozakis, Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Dean Spielmann and Sverre Erik Jebens, assisted by Søren Nielsen, Section Registrar, delivered its judgment. The Chamber held unanimously that there had been a violation of Article 1 of Protocol No. 1 in that the applicant, on account of unlawful actions by the bank's liquidator, had not obtained effective payment of the money owed to him by the bank in accordance with the statutory principle of proportional distribution of assets amongst creditors with the same priority ranking. It made no award under Article 41 of the Convention, since the applicant had failed to submit claims in this respect.

8. On 9 April 2010 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber of the Court, and the Panel of the Grand Chamber accepted that request on 28 June 2010.

9. The composition of the Grand Chamber was determined according to the provisions of former Article 27 §§ 2 and 3 (now Article 26 §§ 4 and 5) of the Convention and Rule 24.

10. The applicant and the Government each filed written observations on the merits.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 January 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr G. MATYUSHKIN,
the Representative of the Russian Federation, *Agent*,
Ms O. SIROTKINA,
Ms E. KUDELICH,
Mr D. SHISHKIN *Advisers;*

(b) *for the applicant*

Ms J. EVANS, *Counsel,*
Mr B. BOWRING,
Mr M. KHASANOV, *Advisers.*

The Court heard addresses by Ms Evans, Mr Bowring, Mr Khasanov, and Mr Matyushkin.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1948 and lives in Krasnodar.

A. Proceedings against the bank for recovery of assets

13. On 15 April 1994 the applicant made a deposit in a savings account with the commercial bank Yurak ("the bank"). After the bank announced that it was changing the interest rate, the applicant requested the closure of his account in August 1994, but the bank informed him that it was unable to repay his capital plus interest as its funds were insufficient. The applicant sued the bank, seeking repayment of the capital he had deposited, together with interest, a penalty payment and compensation for pecuniary and non-pecuniary damage.

14. On 20 February 1995 the Oktyabrskiy District Court of the town of Krasnodar partly upheld the applicant's claims and ordered the bank to pay him a total of 10,156 Russian roubles (RUB) (which included the capital of the deposit, interest accrued, compensation for non-pecuniary damage and penalties). That decision was upheld and became final on 21 March 1995. In a judgment of the Oktyabrskiy District Court of 5 April 1996 the above-mentioned award was recalculated in line with the inflation rate. The award was thus raised to RUB 17,983.

15. In the meantime, on 16 June 1995, at the request of the Central Bank and the Russian Savings Bank, the Commercial Court of the Krasnodar Region declared the bank insolvent. On 19 July 1995 the insolvency procedure was opened by that court and a liquidator was appointed by the court to oversee the bank's administration in that connection.

B. Distribution of the bank's assets

16. On 11 January 1996 the Commercial Court approved the provisional statement of affairs based on the bank's financial situation at 28 December 1995. As a result of the sale of the bank's assets, RUB 2,305,000 had been accumulated on the bank's account. According to the Government, the bank

had incurred debts against 7,567 first-class creditors, whose claims amounted to RUB 24,875,000.

17. Under the law which defined the order of distribution of assets of insolvent entities, the applicant belonged to the first class of creditors, whose claims were to be satisfied before others. However, on 18 January and 13 March 1996 the creditors' body of the bank created a special group of "privileged" creditors within the first class. That privileged group included disabled persons, war veterans, persons in need and persons who had actively assisted the liquidator within the insolvency proceedings. Those categories of creditors were to receive full satisfaction of their claims before other creditors belonging to the same class (the first). As a result, almost all of the funds collected during the liquidation process were used for repayment to those "privileged" creditors: they were reimbursed by the liquidator at 100% of the amounts due to them. On 6 April 1998 the applicant received the sum of RUB 140 (i.e. less than 1% of the amount of RUB 17,983 owed to him by the bank under the 1996 judgment).

C. First set of proceedings against the liquidator

18. On 22 April 1998 the applicant challenged, before the Commercial Court, the fact that other creditors had received repayment at 100%, whereas he had received less than 1% of the amount due to him. Relying on sections 15 and 30 of the Corporate Insolvency Act 1992 ("the 1992 Act"), he claimed that he belonged to the same class as the "privileged" creditors, and that the bank's assets should have been distributed evenly. He sought repayment of the remainder of the sum owed to him, in accordance with the principle of proportional distribution of the assets of the bank amongst creditors of the same class.

19. On 6 July 1998 the applicant's action was dismissed at first instance. On 26 August 1998 the Commercial Court of the Krasnodar Region reversed the judgment of the first-instance court and held that, in deciding to repay certain categories of creditors at 100%, the creditors' body had overstepped the limits of its powers under section 23 of the 1992 Act. By enforcing that decision and distributing the assets at 100% to the "privileged" creditors, the liquidator had, in turn, disregarded the requirements of sections 15 and 30 of the Act. Pointing out that section 30 of the Act was not open to broad interpretation, the Commercial Court of the Krasnodar Region ordered the liquidator to redress the violations thus observed within one month and to inform it of the measures taken in that connection.

20. The liquidator appealed on points of law to the Federal Commercial Court for the North Caucasus, arguing that he had distributed the assets pursuant to a decision of the creditors' body, that the distribution had complied with Article 64 of the Civil Code and that it had not therefore been

in breach of the requirements of section 30 of the 1992 Act. On 12 November 1998 his appeal on points of law was dismissed. Upholding the decision of 26 August 1998, the court stated that the liquidator should not have enforced a decision by the creditors' body that was in breach of the law.

21. It appears that the enforcement of the decision of 26 August 1998 (upheld at last instance on 12 November 1998) and, in particular, the redressing of the applicant's financial situation, were not possible on account of the bank's lack of assets.

D. Second set of proceedings against the liquidator

22. In view of the failure to enforce the decision of 26 August 1998, on 2 September 1998 the applicant filed a complaint with the Commercial Court (supplemented by him on 27 January 1999). He requested that the liquidator in person repay him the remainder of his 1995 award of RUB 17,983, with interest, plus compensation for non-pecuniary damage and loss of time, representing a total of RUB 22,844.

23. By a ruling of 4 February 1999 the Commercial Court rejected the applicant's request. The complaints in question were examined in the context of the insolvency procedure opened against the bank; within the same procedure the court examined the bank's balance sheet, as submitted by the liquidator. A representative of the Central Bank of Russia was present at the hearing. The Commercial Court found that on 20 February 1995 and 5 April 1996 the Oktyabrskiy District Court had already awarded the applicant the sum of RUB 17,983 to cover his deposit, plus penalties and damages, and that it was not possible to rule on the same request for a second time. The Commercial Court further established that the applicant appeared in the list of creditors as number 519 and that, in respect of the actual capital originally deposited, the bank owed him a residual amount of RUB 8,813. The court pointed out that this sum could be paid to him under the conditions laid down in Article 64 of the Civil Code. The court also rejected the claims for loss of time, as the relevant legislation did not provide for such compensation. Furthermore, the applicant [had] "failed to prove that the losses were caused by the liquidator's actions".

24. On 31 March 1999 the Commercial Court of the Krasnodar Region, hearing the case on appeal, upheld the decision of 4 February 1999. The court of appeal held, firstly, that the applicant's claims against the liquidator were "stand-alone claims, examined by the court of first instance and ... rightly rejected". The court of appeal's reasoning read as follows:

> "The law in force does not envisage satisfaction of claims which did not arise during the period of the bank's operations but only during the period of the insolvency procedure ... On a bank's insolvency, its debt obligations are declared due, but the insolvency procedure is initiated with a view to amassing liquidation assets which

> must be allocated among the debts owed to creditors and arising prior to the insolvency.
>
> Furthermore, [the applicant's] right to recover [the original court award] from the bank already exists; therefore, satisfaction of his claims [against the liquidator] would lead to repeated recovery of the same amount, but this time in the form of damages, which is unfounded.
>
> [In the original court award the applicant] was also awarded a sum for non-pecuniary damage, and in light of the above such damages cannot be awarded for a further period.
>
> The existing provisions of civil legislation make no provision for compensation for loss of time.
>
> The court of appeal also takes into account the fact that the failure to pay the amounts [due to the applicant] is a result of the absence [of funds], since, following the court of appeal's judgment of 26 August 1998 ... the assets of the bank in liquidation did not increase ..., as is evident from the report provided by the liquidator on the work of the liquidation committee and the documents appended to the report".

25. The applicant lodged a cassation appeal against that judgment. On 9 June 1999 the Federal Commercial Court for the North Caucasus dismissed the applicant's appeal on points of law on the following grounds:

> "The decision of the creditors' body and the liquidator's action ... admittedly breached the principle of proportional payment to creditors at the same level of priority, but did not cause [the applicant] the damage he alleged, because the 100% satisfaction of all first-level creditors was not possible on account of the lack of assets available for distribution. The sum repaid to [the applicant] was thus calculated in proportion to the amount of his claim and to the assets realised in the course of the liquidation. Taking into account the fact that the insolvency procedure was ongoing when the dispute was examined, the courts of first and appellate instance rightly referred to the possibility of [the applicant's] receiving the outstanding debt owed to him under Article 64 of the Civil Code of the Russian Federation.
>
> The claims for non-pecuniary damage and compensation for loss of time were rightly refused by the court as unjustified on the grounds set out in the earlier judicial decisions.
>
> In view of the above [the court of cassation] finds that the refusals by the courts of first and appellate instance to grant [the applicant's] claims were justified. There are no grounds for overruling or modifying the judicial decisions taken."

26. On 17 June 1999 the Regional Commercial Court confirmed the statement of affairs as presented by the liquidator and approved by the creditors' body, and closed the insolvency procedure on grounds of insufficient assets. The applicant did not attempt to bring any new claims against the liquidator.

E. Supervisory review proceedings

27. After the Government had been given notice of the application, the President of the Supreme Commercial Court of the Russian Federation lodged, on 31 January 2001, an application for supervisory review (*protest*) against the judgments of 4 February, 31 March and 9 June 1999, on the ground that they had been given in breach of Article 22 of the Code of Commercial Procedure, which determined the jurisdiction of the commercial courts. Among other things, he stated that examination of the applicant's complaints against the liquidator within the context of the insolvency procedure opened against the bank had been contrary to the 1992 Act governing such procedures. Since those complaints had concerned a dispute between the applicant and the liquidator, they were not related to the insolvency procedure as such and the applicant should have submitted them to the courts of general jurisdiction. On those grounds the President sought the annulment of the decisions at issue and discontinuance of the proceedings concerning the above-mentioned complaints.

28. On 17 April 2001 the Presidium of the Supreme Commercial Court of the Russian Federation granted those requests in full, endorsing the arguments raised in the application for supervisory review. The Presidium concluded that the commercial courts had not had jurisdiction to hear the case against the liquidator in person, annulled the decision rendered in 1999 and closed the proceedings.

29. On 1 June 2001 the applicant submitted a request for supervisory review of the 17 April 2001 decision to the same Presidium. On 4 July 2001 his request was dismissed as ill-founded by the Vice-President of the Supreme Commercial Court.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

A. Attribution of international responsibility to States

30. The Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001 (*Yearbook of the International Law Commission*, 2001, vol. II, Part Two), and their commentary, codified principles developed in modern international law in respect of the State's responsibility for internationally wrongful acts. In that commentary the ILC stated, *inter alia*, as follows (see paragraph (6) of the commentary to Chapter II):

> "In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by

international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government."

31. The ILC, in its commentary, described the phenomenon of "parastatal entities". It noted as follows (see paragraph (3) to the commentary to Article 5):

"The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 [of the Articles] refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority."

32. As the ILC also recognised:

"Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise" (see paragraph (6) of the commentary to Article 5).

B. Insolvency procedures in Russia

1. Civil Code of 1994

33. Under Article 63 of the Civil Code, after expiry of the period within which creditors must file their claims, the liquidation committee draws up a provisional statement of affairs containing information on the bankrupt company's estate, the claims filed by the creditors and the results of the examination of those claims. The statement must be approved by the body that has taken the decision to wind up the company. If the company's monetary assets are insufficient to satisfy the creditors' claims, the liquidation committee will sell off the estate by auction. The distribution of assets to the creditors may begin in accordance with the interim statement once it has been approved, except in respect of fifth-level creditors who will be unable to receive any money owed to them for one month following that approval. Once all the payments have been made, the final statement of affairs is drawn up and approved in the same manner. Should the assets prove insufficient, unsatisfied creditors may request the courts to order the owner of the company to honour their claims out of his own personal funds.

34. Article 64 of the Civil Code, as in force prior to 20 February 1996, made a distinction between five categories of creditors, providing that

payment could be made to a given class only when the creditors at the previous level had been satisfied. According to this classification the applicant belonged to the fifth class of "other creditors". Article 64 made no mention of a category of creditors who were pensioners, war veterans, persons in need or persons assisting the liquidator in the insolvency proceedings.

35. Under a new provision, inserted into this Article on 20 February 1996, when a bank or other lending institution is wound up, private persons having made deposits with it are to be repaid as a first priority.

36. Article 64 further provides that where a company in liquidation has insufficient assets, they must be distributed among creditors at the same level in proportion to their respective claims.

2. *Law of 19 November 1992 ("the 1992 Act") on corporate insolvency (bankruptcy) (applicable to insolvency procedures opened prior to 1 March 1998)*

37. Under section 3(1) and (2) of the 1992 Act, insolvency cases fall within the jurisdiction of the commercial courts, which examine them in accordance with the rules laid down in the Act or, where no such rule exists, in accordance with the Code of Commercial Procedure of the Russian Federation.

38. Under section 15 of the Act, insolvency procedures are opened in order to satisfy the creditors' claims on a *pari passu* basis, to declare the bankrupt company released from his obligations and to protect the parties from unlawful actions against each other.

39. Section 18(2) provides that, after a company has been declared insolvent and an insolvency procedure has been opened against it, any claims against the company's assets may be submitted only in the context of such procedure.

40. Section 20 lists the various participants in insolvency proceedings as the liquidator, the general meeting of creditors, the creditors' committee, the creditors, etc. The general meeting of creditors may form a creditor's committee and define its functions (Section 23 (2)). The Court will use the term "the creditors' body" as referring to either of these bodies, as the case may be.

41. The creditors' body nominates a candidate to act as the liquidator before the commercial court for approval (Section 23(2) of the Act) which then appoints the liquidator (Section 19). Under section 21(1) the liquidator takes over the administration of the insolvent company, convenes a general meeting of creditors, takes control of the insolvent company's property, analyses the financial situation, examines the merits of the creditors' claims, accepts or rejects them, oversees the liquidation process to realise the assets, sets up and heads the liquidation committee.

42. In accordance with section 21(2), taken together with section 12(4), candidates for the office of liquidator must be economists or lawyers, or have experience of company management. They must not have a criminal record. No one holding a position of responsibility in a company that is a debtor or creditor may be appointed. Candidates for the office of liquidator must declare their income and assets.

43. In the situations referred to under the Act, the commercial court examines the lawfulness of all actions by the participants involved in the insolvency procedure (Section 19). Under section 21(3) the liquidator may challenge before the court any decisions of the creditor's body when those decisions fall outside its remit.

44. Under section 27(1), after the expiry of a two-month period within which the creditors must submit their claims against the insolvent company, the liquidator will draw up a list of the claims that have been accepted and rejected, indicating the amounts for those that have been accepted and the level of priority for each. The list must be sent to the creditors within a period of two months.

45. Section 30 establishes the various levels of priority for the distribution of the proceeds of the liquidation. Payment of the sums due to creditors at a given level is made once those at the previous level have been satisfied (paragraph 3). If insufficient assets are realised to pay in full the creditors at a given level, the money that is available will be paid to them *pari passu* in proportion to the amounts of their respective claims (paragraph 4). Section 30 makes no mention of a category of creditors who are disabled, war veterans, persons in need, or persons assisting the liquidator. Paragraph 1 provides that any expenses arising from the liquidation, the liquidator's fees and the expenses of the debtor company's ongoing operations must take priority over the claims of first-level creditors.

46. Section 31 provides that a creditor may challenge before the commercial courts any decision of the liquidator which, in his view, breaches his rights and legitimate interests.

47. Under section 35(3), any claims that cannot be satisfied because the proceeds of the liquidation are insufficient will be regarded as extinguished.

48. Section 38 provides that the bankrupt company will be regarded as wound up from the time of its exclusion from the corresponding national register, pursuant to the decision of the commercial court closing the insolvency procedure.

3. Federal Laws on insolvency of 8 January 1998 ("the 1998 Act"), and of 26 October 2002 ("the 2002 Act").

49. On 8 January 1998 a new Insolvency Act was adopted ("the 1998 Act"). It replaced the 1992 Act and was applicable to insolvency procedures opened after 1 March 1998. Section 21(3) of the 1998 Act provided that creditors were entitled to seek compensation from the liquidator in respect

of any damage that the latter might have caused to them by an action or omission in breach of the law. Section 114 provided for the same principles of distribution and *pari passu* repayment as section 30 of the 1992 Act.

50. In accordance with section 98(1), sub-paragraph 7, of this Act, claims against the bankrupt company may be submitted only in the context of the insolvency procedure (see also section 18(2) of the 1992 Act).

51. On 26 October 2002 the new Insolvency Act was adopted. It replaced the 1998 Act, and, in the following years, the 2002 Act underwent a number of changes. Section 20-4 (4) of the 2002 Act establishes liability of the liquidator for damage caused to the creditors by his failure to comply with his duties, if that failure was established by a final court decision. The 2002 Act provides that a liquidator should be covered by a professional liability insurance to cover his liability to the creditors (Section 20 of the Act). Sections 32 and 33 stipulate that bankruptcy cases are within the jurisdiction of the commercial court, irrespectively of the status of the creditors. Section 20 (12) stipulates that "disputes related to the professional activities of the [liquidators] ... are within the competence of commercial courts". Pursuant to Section 60 of the Act creditors of a bankrupt company are entitled to complain to a commercial court about the liquidator's acts or omissions within the bankruptcy proceedings.

C. Examination of disputes within insolvency procedures

1. Insolvency Acts of 1992, 1998 and the Banks Insolvency Act of 1999; the Code of Commercial Procedure of 1995; the Code of Civil Procedure of 1964

52. Since the 1990s the Russian judicial system has been comprised of three elements – courts of general jurisdiction, commercial courts and constitutional courts. Under Article 25 § 1 of the Code of Civil Procedure of 1964 (in force at the material time), courts of general jurisdiction were competent to hear civil cases in which at least one party was a natural person (as distinct from a legal person, such as a company).

53. The Code of Commercial Procedure of 1995 (No. *70-FZ* of 5 May 1995, in force at the material time) stated that the commercial courts could determine "economic disputes arising from civil, administrative and other legal relationships ... between legal persons ... and individual entrepreneurs..." (Article 22 § 1 of the Code). Article 22 § 3 stipulated that commercial courts were competent to hear other cases, namely "insolvency (bankruptcy) cases concerning legal entities and natural persons". Article 22 § 4 stipulated that commercial courts were competent to hear cases involving natural persons (not having individual entrepreneur status) where this was provided for by the Code itself or by another federal law.

54. Article 31 of the Code of Commercial Procedure stipulated:

"... A creditor who considers that his rights and legitimate interests are breached by a decision of the liquidator can bring an application (*zayavlenie*) before the commercial court. Following the examination of such an application the commercial court should take an appropriate decision."

55. Article 143 of the Code provided that insolvency cases were to be examined by commercial courts in accordance with the Code and with the specific provisions of the insolvency legislation.

56. Section 3 of the 1992 Insolvency Act stipulated that commercial courts had jurisdiction to hear insolvency cases.

57. The 1998 Insolvency Act contained similar provisions. Sections 5 and 29 of that Act provided that insolvency cases where the debtor was a company (as opposed to a natural person) fell under the jurisdiction of the commercial courts. Section 55 of the 1998 Act provided that the commercial courts were competent to hear creditors' applications concerning a breach of their rights or legitimate interests by the liquidator.

58. Sections 5, 34 and 50 of the 1999 Banks Insolvency Act provided for the jurisdiction of commercial courts in the insolvency procedures concerning banks and also contained references to the Code of Commercial Procedure.

2. Position of the Constitutional Court

59. A judgment of 12 March 2001 by the Constitutional Court concerned, *inter alia*, questions of access to a court in insolvency procedures. Paragraph 4, concerning the constitutionality of section 18(2) of the 1992 Act (section 98(1) in conjunction with sections 15(4) and 55(1) of the 1998 Act), reads:

"... when examining the claims of creditors who are natural persons ..., the commercial courts do not have jurisdiction to issue binding directions of a pecuniary nature to the liquidator, acknowledging the existence of a claim or right in favour of creditors ... This limitation ... must not be interpreted as preventing the courts of general jurisdiction from examining on the merits the pecuniary claims ... of those creditors ..., in accordance with the legislation on insolvency.

Nor do the provisions at issue contain any clause that would prevent commercial courts from giving decisions that enable the persons concerned to secure in full their right to judicial protection in the context of insolvency procedures, especially as other provisions of the Federal Law on insolvency (bankruptcy) precisely provide for the settlement of disputes through the courts (sections 41, 44, 57, 107, 108 et seq.).

The refusal by a commercial court to examine a complaint on the grounds that it does not have jurisdiction ... does not prevent the creditor from applying to the courts of general jurisdiction in order to secure protection of his rights ... The right to judicial protection, as enshrined in the Constitution, must be upheld even in the absence of legislative norms establishing a division of jurisdiction between the commercial courts and the courts of general jurisdiction.

It follows from this interpretation that [the provisions at issue] do not prevent the courts of general jurisdiction from examining claims filed by non-corporate creditors

> against the liquidator and seeking ... compensation for damage, nor do they prevent the commercial courts from securing the enforcement, in accordance with the above-mentioned Federal Law, of the decisions taken by the courts of general jurisdiction ...”

THE LAW

60. The applicant complained about his inability to obtain the effective payment of the 1995 court award on account of an unlawful distribution of assets by the liquidator. He referred to Article 1 of Protocol No. 1, which provides:

> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

61. As before the Chamber, the Government claimed before the Grand Chamber that the applicant had failed to exhaust domestic remedies. In particular, they took the view that the applicant should have sued the liquidator personally in separate proceedings before the courts of general jurisdiction, in accordance with Chapter 59 of the Civil Code (“Obligations in respect of damage caused”), to complain about the unlawful distribution of the bank’s assets. The Court considers that the question of exhaustion of domestic remedies is closely linked to the merits of the applicant’s complaint under Article 1 of Protocol No. 1 to the Convention, in so far as the applicant can be understood as complaining about his inability to claim compensation for damage caused by the liquidator’s actions. This objection must therefore be joined to the merits and will be analysed below.

II. TEMPORAL JURISDICTION

62. On 12 January 2011, following the hearing and deliberations, the Grand Chamber put to the parties additional questions, concerning, in particular, the Court’s jurisdiction *ratione temporis* in the present case.

A. The parties' submissions

63. In their written reply the Government argued that the impugned distribution of the insolvent bank's funds took place in 1996, that is, before the date of the entry into force of the Convention in respect of Russia (5 May 1998). The fact that this deprivation had enduring effects did not produce a continuing situation. The Government distinguished the present case from that of *Sovtransavto Holding v. Ukraine* (no. 48553/99, §§ 54 et seq., ECHR 2002-VII), where the Court established that the loss of control of a company was a protracted process, creating a continuing situation. In the present case the applicant's complaint concerned a single act of distribution of the bank's assets on 13 March 1996. No new bank assets were discovered after that date. The subsequent decisions of the commercial courts (taken after 5 May 1998) did not violate the applicant's rights. When the Russian courts ordered that the violation of the applicant's rights be redressed, it was too late, since by that time the debtor no longer had any assets. Thus there were objective reasons for the failure to enforce the 1998 judgment. In support of this argument the Government referred to the cases of *Blečić v. Croatia* ([GC], no. 59532/00, § 79, ECHR 2006-III) and *Kopecký v. Slovakia* ([GC], no. 44912/98, § 38, ECHR 2004-IX). They concluded that the Court did not have jurisdiction to examine the case.

64. The applicant maintained, first of all, that the exact date of the distribution of assets was unclear. The creditors' body's decision ordering distribution of assets was taken on 13 March 1996. However, it was not until 6 April 1998 that the applicant received RUB 140 of the RUB 17,983 owed to him. If this date was correct, then a period of more than two years elapsed between the decision ordering distribution of funds and its implementation. In the absence of any clear evidence as to the time scale of the distribution process, it was impossible to exclude the possibility that the distribution process was concluded after 5 May 1998, when the Convention entered into force in respect of Russia.

65. Secondly, at the time when the decision by the creditors' body was taken, the total amount of money available for distribution was not known. There was no evidential basis for the Government's assertion that from 12 November 1998 onwards the bank had no assets. There was no information on developments in the insolvency procedure from August 1998 until its closure in June 1999. Therefore, prior to the formal closure of the liquidation procedure on 17 June 1999 it remained theoretically possible for the applicant to receive the monies due to him. That being the case, the Government's assertion that the distribution of funds represented the final interference with the applicant's rights was unsustainable.

66. The applicant considered that the failure of the State to enforce a binding legal judgment of 26 August 1998 formed part of the multi-stage "continuing situation" of interference with his rights. Although the domestic court did not specify the means by which the liquidator should have

provided the applicant with redress, it had been open to the liquidator to either recover the money from those to whom it had been unlawfully distributed or to employ any other means within his discretion. Those possibilities were not in any way precluded by the debtor's lack of funds. In fact, the continued absence of assets was caused precisely by the liquidator's unlawful actions and his failure to comply with the terms of the court order to rectify the situation (assuming that the bank indeed had no assets).

67. Finally, in the applicant's opinion, the domestic judgments of 1999 should be regarded as yet another stage in that "continuing situation", despite the fact that they were annulled by way of supervisory review in 2001. The interference with the applicant's possessions took the form of a four-stage incremental process which was comprised of (a) the liquidator's unlawful distribution; (b) the failure of the domestic authorities to enforce the judgment of 26 August 1998; (c) the refusal of the commercial courts (in the light of this failure to enforce) to hear the applicant's claim against the liquidator personally; and (d) the decision by the Regional Commercial Court to close the insolvency procedure.

B. The Court's analysis

68. The Court observes that the distribution of the bank's assets by the liquidator to the "privileged" creditors took place, most probably, in 1996, and in any event before 6 April 1998, when the applicant received his share of the remaining assets of the bank. The Convention entered into force in respect of Russia on 5 May 1998. The Court agrees with the Government that the distribution of the bank's assets was an instantaneous act, and, as such, falls outside the Court's jurisdiction *ratione temporis*. That being said, the Court observes that after 5 May 1998 the applicant was involved in two sets of judicial proceedings concerning wrongful distribution of the bank's assets and the liquidator's personal liability. The question is whether the Court has jurisdiction to examine facts related to those proceedings.

69. The Government, referring to *Blečić* and *Kopecký*, both cited above, argued that the proceedings of 1998 and 1999 should not be dissociated from the original act of interference, namely the wrongful distribution of the banks' assets. However, in the Court's opinion, the present case must be distinguished from *Blečić* and *Kopecký*, for the following reasons. As acknowledged by the Government, under Russian law the applicant was entitled to claim damages from the liquidator for the latter's wrongful acts. Legally speaking, the applicant had a valid tort claim at the time when the Convention entered into force in respect of Russia. It became sufficiently established even later, with the final judgment of 12 November 1998, when the courts recognised that the liquidator had acted unlawfully and ordered him to provide the applicant with redress. The Court observes that in

Plechanow v. Poland (no. 22279/04, §§ 76 et seq., 7 July 2009) it dismissed the Government's objection *ratione temporis* and distinguished between the original confiscation of property and the compensation proceedings. In *Broniowski v. Poland* ((dec.) [GC] no. 31443/96, §§ 74 et seq., ECHR 2002-X) the Grand Chamber drew a similar distinction. It held that "the applicant did not complain of being deprived of the original property" in the 1940s, but rather complained about the "alleged failure to satisfy an entitlement to a compensatory measure which was vested in him under Polish law on the date of the Protocol's entry in force". The Court will follow this line of reasoning in the present case. As in *Broniowski*, the applicant, when the Convention entered into force in respect of Russia, had a defendable tort claim which outlived the original tort. Thus, the central question is why the applicant's attempt to restore his rights failed, first in 1998 and then in 1999, that is, after the entry into force of the Convention. The Court concludes that it has temporal jurisdiction to examine whether the applicant's rights under Article 1 of Protocol No. 1 to the Convention were properly secured in the proceedings of 1998 and 1999.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

A. Chamber judgment of 14 January 2010

70. The Chamber began by rejecting the Government's non-exhaustion plea. The Chamber noted that "the annulment [of the 1999 judgments in 2001, by way of supervisory review,] was pronounced in the case after the respondent Government had been given notice of the application and [that] they used this to raise an objection on grounds of non-exhaustion of domestic remedies". The Chamber did not accept that such an objection might be validly derived from the supervisory review proceedings of 2001. The Chamber then shifted the focus to the 1998 proceedings, which had ended with the judgment of 12 November 1998. In the Chamber's opinion, in 1998 the applicant had availed himself of his right to contest the liquidator's unlawful actions. The 1998 judgments were given within the subject-matter jurisdiction of the commercial courts; as a result, it was immaterial whether or not the applicant's claim against the liquidator in person had been brought in the proper court – the applicant had exhausted remedies by introducing the first complaint with the commercial court, and those proceedings ended on 12 November 1998.

71. As to the merits, the Chamber held that the amount awarded by the Russian courts in 1995 (hereinafter "the 1995 award") could be described as the applicant's "possessions" under Article 1 of Protocol No. 1. By distributing the assets to the "privileged" creditors before all of the other

first-class creditors, the liquidator had acted unlawfully, and, as a result, the applicant did not receive what he would otherwise have received. There had therefore been an unlawful interference by the liquidator with the applicant's right to the enjoyment of his possessions.

72. The Chamber further found that the liquidator was a representative of the State. That conclusion was based on the status of the liquidator as defined in sections 19 and 21 of the 1992 Insolvency Act. The Chamber referred to the fact that the liquidator was appointed by the court according to certain eligibility criteria, that he was supervised by the court, and that he acted in the interests of all creditors of the company. The Chamber also referred to "the nature of his duties", which "pertained to public authority". The Chamber held that the liquidator was "expected to achieve a 'fair balance' between the demands of the general interest and the requirements of the protection of the individual's fundamental rights". Since the interference with the applicant's rights was made by a public authority, and was unlawful, it was contrary to Article 1 of Protocol No. 1 to the Convention.

B. The Government's submissions before the Grand Chamber

1. On the legal status of the liquidator

73. In their referral request the Government mainly challenged the Chamber's finding that the liquidator was a "State authority" within the meaning of Article 34 of the Convention. They relied on the case of *Katsyuk v. Ukraine* (no. 58928/00, § 39, 5 April 2005), which suggested that, despite the fact that the liquidator was appointed by the court, he was not a "public official" and his actions could not be directly attributed to the State. The application was therefore incompatible with the Convention *ratione personae*.

74. In support of this argument, they referred to the liquidator's legal status, the manner of his appointment, and the degree of his accountability before the State authorities. The Government compared the status of liquidator in Russia and in Ukraine and concluded that in both countries the liquidator was not a public authority, as was rightly held by the Court in the Ukrainian context in the case of *Katsyuk*, cited above. Thus, the liquidator was a professional employed by the creditors' body. His candidature was approved by the commercial court, but the court's task was limited to verifying whether the liquidator met the statutory qualification requirements. The initiative in appointing the liquidator belonged to the creditors' body, it submitted the liquidator's candidature to the court and supervised his work.

75. The creditors' body not only nominated the liquidator; it also exercised operative control over his actions. For example, it approved

transactions involving the insolvent company's assets, fixed the price of sale of its property and approved friendly settlements with debtors. The courts were not even mentioned by the law as a party to the insolvency procedure – they only ensured the formal lawfulness of the liquidator's actions. The courts had no power to issue binding directions to liquidators as to the management of the estate of an insolvent company.

76. The liquidator was remunerated by the creditors' body for his work; the State did not pay for his services. Further, he acted in his own interest. Although his activity might have been of some public importance, he did not exercise any official powers and accepted the appointment in order to make a profit. He did not have a legal monopoly but operated in a sector open to competition, and was unable to issue orders or regulations binding on third parties, or to impose sanctions or exercise other governmental functions. His actions could be challenged in civil proceedings, rather than by means of an administrative complaint. The Government described the liquidator's duties and powers in the insolvency procedure. His mission was to ensure the fair distribution of an insolvent company's assets among the creditors, within a very narrow framework established by the relevant legislation. In sum, the liquidator enjoyed significant operational and institutional autonomy from the State and was completely independent financially from the authorities. The Government concluded that the liquidator acted as a businessman rather than a State official. That position was reinforced in the 2002 Insolvency Act, which provided for the creation of a self-governing non-governmental organisation of professional liquidators.

2. Alleged failure of the State to fulfil its positive obligations

77. In so far as the Government's positive obligations under Article 1 of Protocol No. 1 to the Convention might have been engaged, the Government noted, first of all, "the limited scope of reliable data" as to the assets of the insolvent bank available for distribution among its creditors by the liquidator. They acknowledged that the applicant, as a result of the unlawful acts of the liquidator and the creditors' body, had received less than he could legitimately have expected to receive, but did not agree with the applicant that the total amount of the original court award was recoverable.

78. The Government admitted that the State might have an obligation to assist creditors in recovering their money from an insolvent debtor. However, it had fulfilled its positive obligations by establishing an appropriate legal framework for insolvency procedures. Thus, special legislation (the 1992 and 1998 Acts) had been enacted in order to protect the interests of creditors. The legislation provided for the distribution of the assets of an insolvent company on a *pari passu* basis. Those Acts (sections 31 and 21 respectively) guaranteed the right of the creditor to

complain to the court about actions or omissions on the part of the liquidator. The liquidator was personally accountable for his acts to the creditors. The 2002 Act went even further by requiring mandatory professional insurance for liquidators. The Government referred to the practice in several other member States where the liquidator was personally liable *vis-à-vis* the creditors of an insolvent company.

79. In so far as the specific circumstances of the present case are concerned, the Government argued as follows. First, the applicant had been successful in challenging the liquidator's action: in 1998 the commercial courts held that those actions had been unlawful and ordered the liquidator to restore the applicant's rights within one month. However, as a result of the unlawful actions of the liquidator and the creditors' body, all of the bank's assets had been lost, and, as a result, it was impossible to enforce the court order of 1998. The State could not be held responsible for non-enforcement of a judgment if it was caused by factors outside the State's control.

80. In addition, the applicant was entitled to sue the liquidator personally for his unprofessional conduct in discharging his duties. The existence of that remedy derived from sections 31 and 21 of the 1992 and 1998 Acts respectively. The possibility of claiming damages from the liquidator was also confirmed by the Constitutional Court. The applicant used that legal avenue by filing a new complaint with the commercial courts, which examined and dismissed it mainly on the ground that the liquidation procedure was still pending. Indeed, it would have been unjust to award the applicant any damages when there was still a possibility (however vague) of obtaining the money from the bank itself. Had the courts satisfied the applicant's claims, he would have been in a position to recover the same amount twice, and that would be tantamount to unjust enrichment.

81. After the bank's liquidation on 17 June 1999, all of its unpaid debts were extinguished. After that date the applicant had the option of recovering damages from the liquidator. However, for some reason he did not use that avenue. The mere existence of doubt as to the prospects of success of such a remedy was not sufficient to justify the applicant's failure to use it.

82. The Government also argued that the proper venue for examining such claims would be a court of general jurisdiction. The applicant had the status of an individual. Commercial courts could only hear disputes between companies or individual entrepreneurs. This was confirmed by the Supreme Commercial Court's judgment of 17 April 2001, rendered by way of supervisory review. However, even after that judgment the applicant did not lodge a claim against the liquidator with the proper court. The Government concluded that the applicant had had access to a legal remedy capable of restoring his rights but failed to use it, for no good reason.

C. The applicant's submissions before the Grand Chamber

1. On the legal status of the liquidator

83. The applicant argued that the liquidator was appointed and supervised by the State. The Chamber had been correct when it distinguished the case of *Katsyuk* (cited above) from the present case, since the respective legislative frameworks were different in a number of ways, including the questions of appointment of the liquidator, supervision of his activities, the relationship between the liquidator and the creditors' body, remuneration of the liquidator, and powers in respect of misconduct by the liquidator.

84. The liquidator under Russian law was not an insolvency practitioner but rather a person who met certain qualification requirements, not necessarily linked to that particular sphere. Thus, a civil servant was eligible to perform the duties of liquidator. Furthermore, although the creditors were entitled to propose their candidates, the power to appoint the liquidator belonged solely to the court. The courts supervised the activities of the liquidator and the course of the insolvency procedure in general. The liquidator in Russia (unlike his counterpart in Ukraine) had a right to challenge before the court an unlawful decision of the creditors' body. In Russia the liquidator was remunerated by the court, on the basis of the amount defined by the creditors' body and from the funds collected during the liquidation process. The liquidator's actions could be challenged before the courts, and the courts were entitled to give directions to the liquidator and order the payment of compensation to creditors. Ukrainian courts had no such powers *vis-à-vis* liquidators. In sum, the liquidator in Russia was appointed by the court, paid by the court, and supervised by the court. In such circumstances he should have been regarded as a governmental official, and the Government's responsibility for his action should have been engaged.

2. Alleged failure of the State to fulfil its positive obligations

85. Even assuming that the liquidator was a private person, the applicant considered that, in view of the nature of his duties, the State must have been responsible for his actions, at least in an indirect manner. The applicant relied upon the Court's findings in *Costello-Roberts v. the United Kingdom* (25 March 1993, Series A no. 247-C), where the actions of employees in an independent school were found to be the responsibility of the State. The Court concluded in that case that "the State [could] not absolve itself from responsibility by delegating its obligations to private bodies or individuals". A similar approach was adopted in the context of the position of advocates in the case of *Van der Mussele v. Belgium* (23 November 1983, Series A no. 70), and with regard to the status of the Polish-German Reconciliation

Foundation in *Woś v. Poland*, (no. 22860/02, ECHR 2006-VII) and of the Romanian Union of Lawyers in the case of *Buzescu v. Romania* (no. 61302/00, 24 May 2005). The applicant concluded that, in view of the Court's case-law, the actions of the liquidator in the present case engaged the responsibility of the State. Even if the liquidator was not a government official, the Russian State retained a positive obligation under Article 1 of Protocol No. 1 to protect the applicant, as one of the bank's creditors, from unlawful actions by the liquidator. The nature and scope of such an obligation would consist (at the very least) in ensuring that the liquidator's actions were compliant with domestic law. The obligation would also extend to remedying any misconduct by the liquidator. In the present circumstances, the appropriate remedy would have entailed the payment of compensation to the applicant as provided for by domestic law, and the enforcement of such award. The applicant in the present case took every opportunity to challenge both the unlawful distribution of the assets by the liquidator and the failure to enforce the decision of the commercial courts. The domestic courts confirmed the liquidator's unlawful distribution of the assets in 1998 and during further proceedings in 1999, but in spite of those rulings, the insolvency procedure was closed on 17 June 1999 on the grounds of insufficient funds.

86. The applicant's claims against the liquidator (which ended with the judgment of 9 June 1999) were dismissed on several grounds. Thus, the courts held that the matter had already been considered by the courts of general jurisdiction, which made it impossible for the commercial court to consider the same matter. Further, the courts held that the applicant's additional claim to compensation for non-pecuniary damage in respect of mental distress and loss of time were unsubstantiated, since the Insolvency Act did not cover claims for damage incurred during the insolvency procedure. The courts also held that it was impossible to repay the applicant the original award, on account of the bank's lack of assets, but that this would subsequently be possible if and when additional assets became available. The applicant's additional claims for compensation for mental distress and loss of time were dismissed on the merits, whereas his claim in respect of the award by the courts of general jurisdiction was dismissed on procedural grounds.

87. At the time the applicant was entitled to appeal against unlawful actions of the liquidator to the commercial court under section 21 of the 1998 Insolvency Act. The domestic courts considered the applicant's complaints on the merits; this supported the applicant's submission that he had used an appropriate remedy in this situation. As to the Government's reference to the Constitutional Court judgment of 12 March 2001, the applicant noted that, according to the Constitutional Court, a creditor had a right to appeal to the court of general jurisdiction "if the commercial court refused to examine a complaint on the grounds that it [did] not have

jurisdiction”. However, in the current case the commercial courts did not refuse to consider the applicant’s complaints on the ground of a lack of jurisdiction. The 2001 judgment of the Constitutional Court opened the possibility of seeking a remedy in the courts of general jurisdiction but did not exclude the creditors’ right to challenge the liquidator’s decisions before the commercial courts. Only in 2001 was the “jurisdictional” ground raised under the “supervisory review” procedure, and all the previous decisions of the commercial courts (of 4 February, 31 March and 9 June 1999) were annulled. That procedure itself raised serious issues regarding the principle of legal certainty, as held by the Court on numerous occasions.

88. The applicant acknowledged that in theory he could also have sought a remedy in the courts of general jurisdiction against the liquidator’s unprofessional conduct in discharging his duties; however, the annulment of the enforceable judgments issued by the commercial courts made the “general jurisdiction” remedy illusory. For that reason, he did not seek to use the latter remedy, and could not be required to do so. Moreover, as the Chamber had noted, the applicant used the courts of general jurisdiction for his initial complaint to the courts, prior to the opening of the insolvency procedure, but the award of compensation to him (by the decisions of 20 February 1995 and 5 April 1996) was never enforced.

D. The Court’s analysis

89. At the outset, the Court will briefly outline the factual and legal elements which raise no controversy between the parties. First, the Government acknowledged that the 1995 court award had amounted to the applicant’s “possession” within the meaning of Article 1 of Protocol No. 1. Secondly, the Government agreed with the applicant that the liquidator had acted unlawfully in that the assets of the bank, which should normally have been distributed evenly amongst the first-class creditors, had been used for full reimbursement of certain “privileged” creditors. Thirdly, the Government agreed that, as a result of such distribution of funds, other first-class creditors of the bank, the applicant included, had received much less than they could legitimately have expected to receive, given the bank’s financial situation.

90. The Court does not see any reason to disagree with the parties on the above points. It reiterates that a pecuniary claim supported by a final judicial decision (often referred to in its case-law as “a judgment debt”) has always been regarded by the Court as a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention (see *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III, and *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B). Indeed, where the debtor is a private person or company, the pecuniary claim, even supported by a court judgment, is less certain, because its enforceability

largely depends on the solvency of the debtor. As the Court has repeatedly held, "when the debtor is a private actor, ... the State is not, as a general rule, directly liable for debts of private actors and its obligations are limited to providing the necessary assistance to the creditor in the enforcement of the respective court awards, for example, through a bailiff service or bankruptcy procedures" (see, for example, *Shestakov v. Russia* (dec.), no. 48757/99, 18 June 2002; *Krivonogova v. Russia* (dec.), no. 74694/01, 1 April 2004; and *Kesyan v. Russia*, no. 36496/02, 19 October 2006; see also *Scollo v. Italy*, 28 September 1995, Series A no. 315-C, § 44, and *Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005). Nonetheless, such pecuniary claims may also be characterised as "possessions". In the case at hand the bank's assets before their distribution by the liquidator were sufficient to meet at least a substantial proportion of the applicant's claims. Therefore, the 1995 court award was at least partly recoverable. The applicant was a creditor of the first class and the bank's obligations towards him should have been honoured accordingly. However, the money collected was distributed by the liquidator mostly amongst the "privileged" creditors, in breach of the law. As a result of that unlawful action, a significant part of the original award was lost for the applicant. Such was the conclusion of the Chamber (see paragraph 53 of the judgment), to which both parties fully subscribed, and the Grand Chamber does not see any reason to depart from that conclusion. It follows that the applicant has been deprived of his possessions by an unlawful act of the liquidator.

1. Legal status of the liquidator

91. Before the Grand Chamber the Government claimed that the Court had no jurisdiction *ratione personae* to examine the applicant's complaint about the liquidator's actions, since the latter had acted as a private person and not as a State agent. The Court will address this issue first.

(a) Court's case-law

92. The Court has already ruled on the question whether a State can be held responsible under the Convention on account of acts by a company or a private person. A first category of cases (to which the present case belongs) concerns the State's responsibility *ratione personae* for the acts of a body which is not, at least formally, a "public authority". In the case of *Costello-Roberts v. the United Kingdom* (cited above, § 27), the Court held that a State could not absolve itself from responsibility by delegating its obligations to private bodies or individuals, in that case an independent school. Similarly, the Court found in *Storck v. Germany* (no. 61603/00, § 103, ECHR 2005-V) that the State remained under a duty to exercise supervision and control over private psychiatric institutions where patients could be held against their will (see also the cases of *Evaldsson and Others v. Sweden*, no. 75252/01, § 63, 13 February 2007, concerning the

organisation of the labour market; *Buzescu v. Romania*, cited above, § 78, concerning bar associations; and *Woś v. Poland*, cited above, §§ 71-74, where the status of the Polish-German Reconciliation Foundation was discussed).

93. A second category of cases concerns the *locus standi* of an applicant entity under Article 34 of the Convention and the notion of "governmental organisation". In the case of *Radio France and Others v. France* ((dec.), no. 53984/00, § 26, ECHR 2003-X (extracts)), the Court noted:

> "... The category of 'governmental organisation' includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities."

94. As far as the entity Radio France was concerned, the Court noted that although it had been entrusted with public-service missions and depended to a considerable extent on the State for its financing, the legislature had devised a framework which was plainly designed to guarantee its editorial independence and institutional autonomy. In this respect, there was little difference between Radio France and the companies operating "private" radio stations, which were themselves also subject to various legal and regulatory constraints. The Court thus concluded that Radio France was a non-governmental organisation for the purposes of Article 34 of the Convention. Similarly, the Court found that the applicant company in *Islamic Republic of Iran Shipping Lines v. Turkey* (no. 40998/98, § 79, ECHR 2007-...) was a non-governmental organisation, despite the fact that it was wholly owned by the Iranian State and that a majority of the members of the board of directors were appointed by the State. The Court noted that the applicant company was legally and financially independent from the State and was run as a commercial business.

95. Despite the difference between the concept of "governmental organisation" and that of "public authority", the pattern of analysis used by the Court in these two situations is similar. Thus, the principles developed in *Radio France* were applied in the case of *Mykhaylenky and Others v. Ukraine* (nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, §§ 43-46, ECHR 2004-XII), which concerned the question of the State's liability for the debts of an enterprise operating on the private market (see also *Yershova v. Russia*, no. 1387/04, §§ 55 and 62, 8 April 2010).

96. As far as the legal status of insolvency liquidators is concerned, it has been examined by the Court in the following cases. In *Katsyuk* (cited above, § 39) the Court held, *inter alia*, that the liquidator did not have any characteristic of a "governmental organisation", since his appointment and

the approval of his report by the commercial court could not, as such, confer on him such status (see also *Bakalov and Others v. Bulgaria* (dec.), no. 55796/00, 18 September 2007). It should be pointed out, however, that in that case the liquidator had been appointed at a time when the debtor enterprise was already unable to meet its obligations. Moreover, the actions of the liquidator had not been challenged as unlawful or unreasonable. The central question was rather whether, by the very fact of appointing a liquidator, the Ukrainian authorities had assumed liability for the debts of a private enterprise, and the Court found that they had not.

97. In the case of *Sychev v. Ukraine* (no. 4773/02, §§ 54-56, 11 October 2005), the Court examined the status of the liquidation committee and concluded that its prolonged failure to enforce a court judgment "was due to the State's failure to establish an effective system of enforcement of court judgments given against the company undergoing bankruptcy proceedings" (see also *Pokutnaya v. Russia* (dec.), no. 26856/04, 3 July 2008). The Court, however, did not deal with the question whether the liquidation committee was a "public authority". It focussed rather on the State's non-compliance with its positive obligations in this sphere. Nor did the Court examine this issue in cases where it had to decide whether Article 6 was applicable to disputes arising from liquidation procedures (see, for example, *Werner v. Poland*, no. 26760/95, § 34, 15 November 2001; see also *Ismeta Bačić v. Croatia*, no. 43595/06, § 27, 19 June 2008) or in cases where the Court examined the length of bankruptcy proceedings (see *Luordo v. Italy*, no. 32190/96, §§ 67-71, ECHR 2003-IX).

98. Thus, mainly as a result of the variety of situations occurring in the cases brought before the Court, it appears that the case-law on the legal status of insolvency liquidators requires some clarification. The Court will therefore examine whether in the present case the liquidator can be considered to have acted as a State agent, having regard to the criteria set out below.

(b) The liquidator in the present case

99. At the outset, the Court stresses that under domestic law at the relevant time the liquidator was not a public official, as formally speaking the administration of insolvencies was to remain in private hands. The Court will now examine whether the formal status of the liquidator corresponded to the reality of the liquidation process.

(i) Appointment

100. At the relevant time the liquidator in Russia was a private individual employed by the creditors' body, which was a self-interested entity. He was chosen on an open market amongst other professionals competing for the same job. He worked for a fee, which was fixed freely and paid by the creditors' body. To the extent that the State was involved in

the insolvency proceedings it acted as a creditor and not as a "public authority".

101. The appointment of the liquidator was confirmed by a judge. However, as the Government convincingly explained, by doing so the judge simply validated the decision of the creditors' body, after verifying that the person proposed satisfied all the eligibility criteria. As such, this validation did not entail any State responsibility for the way in which the liquidator would discharge his duties.

(ii) Supervision and accountability

102. While the Chamber strongly relied on the domestic court's control over the lawfulness of the liquidator's actions, the Grand Chamber notes that the scope of such control was very limited and had only retrospective effects, for the courts did not have to verify whether the liquidator's decisions were justified from an economic or business point of view. The courts were not empowered to give instructions to the liquidator on how to manage the bankrupt company – this fell within his discretionary powers. The courts only controlled the compliance of his actions with the procedural and substantive rules of the domestic insolvency legislation. Their role was limited to serving as the forum for settling disputes between the creditors of the insolvent company, its debtors and the liquidator. To this extent they played the same role as in any other private dispute.

103. Moreover, under the 1992 Act the liquidator was not accountable to any regulatory body. He was accountable only to the creditors' body or to individual creditors. The relations between the liquidator and the creditors (including the State) were regulated by civil law, which provided for personal liability of liquidators *vis-à-vis* the creditors. The liquidator did not receive any public funding. The 1992 Act did not contain any specific provision on compensation for a liquidator's unlawful actions. This gap was filled by the 1998 Act, which established that creditors were entitled to seek compensation from the liquidator in respect of any damage caused by the latter's unlawful actions. The liquidator could be held criminally responsible for offences such as fraud or embezzlement, but not for criminal offences which could only be committed by public officials. Finally, under the law of tort there was no State responsibility for the liquidator's acts, whereas he was liable before the creditors.

(iii) Objectives

104. While it is clear that the insolvency legislation at the time sought to achieve a fair balance between all competing interests involved in insolvency cases, *inter alia* by introducing various orders of priority between the creditors and establishing fair liquidation procedures, the Grand Chamber considers that the liquidator himself was not obliged to perform that balancing exercise. In the Grand Chamber's opinion, his task was much

more similar to that of any other private businessman appointed by his clients, in this case the creditors, to best serve their – and ultimately his own – interests. As such, the mere fact that his services might also have been socially useful does not turn him into a public official acting in the public interest.

(iv) Powers

105. Most importantly, the liquidator had very limited powers: he was indeed empowered to manage the property of the company in question, but had no coercive or regulatory power in respect of third parties. There was no formal delegation of powers by any governmental authority (and, as a result, no public funding). Unlike a bailiff, the liquidator was unable to seize property, obtain information, impose fines, or take other similar decisions binding third parties. His powers were limited to the operational control and management of the insolvent company's property.

(v) Functions

106. The liquidator is the key person in the liquidation process and, in this capacity, he may be called upon to pay the creditors, whose claims, as in the present case, have been established by a court order. His functions therefore bear some similarity to those of a court bailiff, who is undoubtedly a public authority. Indeed, in most European countries public authorities are involved in the enforcement proceedings and help successful claimants to recover court awards by employing court bailiffs, policemen or other similar officials. The Court has held on numerous occasions that Articles 6 § 1 and Article 1 of Protocol No. 1 to the Convention provide for a positive obligation on the State to assist private persons in the enforcement of court judgments against other private persons (see *Fuklev v. Ukraine*, cited above, §§ 84 and 91; *Scollo v. Italy*, cited above, § 44; *Fociac v. Romania*, no. 2577/02, § 70, 3 February 2005; and *Kesyan v. Russia*, cited above, §§ 79 and 80, 19 October 2006). However, those similarities would not appear decisive in the light of the significant differences between the functions of bailiff and those of a liquidator. Firstly, whereas bailiffs have to execute court orders, liquidators deal with several kinds of claims, including those which have not been made enforceable by a court. Secondly and most importantly, unlike liquidators, bailiffs are entrusted with coercive powers, in addition to being appointed, paid and closely supervised by a competent State authority. Thus, in the context of insolvency procedures the respondent State left the management of the insolvent company in the hands of its creditors and of liquidators appointed by them, whereas in the context of enforcement proceedings it chose to operate through its own officials and to bear direct responsibility for their actions.

(vi) Conclusion

107. It would appear that the liquidator, at the relevant time, enjoyed a considerable amount of operational and institutional independence, as State authorities did not have the power to give instructions to him and therefore could not directly interfere with the liquidation process as such. The State's involvement in the liquidation procedure resulted only from its role in establishing the legislative framework for such procedures, in defining the functions and the powers of the creditors' body and of the liquidator, and in overseeing observance of the rules. It follows that the liquidator did not act as a State agent. Consequently, the respondent State cannot be held directly responsible for his wrongful acts in the present case. The fact that a court was entitled to review the lawfulness of the liquidator's actions does not alter this analysis.

108. The Court must, however, also examine whether the respondent State breached any positive obligations in the present case.

2. Nature and extent of the State's positive obligations in the context of insolvency procedures

(a) General principles

109. The Court has repeatedly held that Article 1 of Protocol No. 1 also establishes some positive obligations. Thus, in the case of *Öneryıldız v. Turkey* ([GC], no. 48939/99, § 134, ECHR 2004-XII), which concerned the destruction of the applicant's property as a result of a gas explosion, the Court held that the genuine, effective exercise of the right protected by Article 1 of Protocol No. 1 did not depend merely on the State's duty not to interfere, but might require positive measures of protection, particularly where there was a direct link between the measures an applicant might legitimately expect from the authorities and his effective enjoyment of his possessions. Even in horizontal relations there might be public interest considerations involved, which may impose some obligations on the State. In *Broniowski v. Poland* ([GC], no. 31443/96, § 143, ECHR 2004-V), for instance, the Court held that positive obligations under Article 1 of Protocol No. 1 might require the State to take the measures necessary to protect property rights.

110. The boundaries between the State's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty of the State or in terms of an interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. It is also true that the aims mentioned in that provision may be of some relevance in assessing

whether a balance between the demands of the public interest involved and the applicant's fundamental property rights has been struck. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see, *mutatis mutandis*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 98 et seq., ECHR 2003-VIII, and the Grand Chamber judgment in *Broniowski*, cited above, § 144).

111. The nature and extent of the State's positive obligations vary depending on the circumstances. Thus, in the case of *Öneryıldız* (cited above), the loss of the applicant's possessions resulted from obvious negligence of the authorities in the face of a very dangerous situation. By contrast, where the case concerns ordinary economic relations between private parties such positive obligations are much more limited. Thus, the Court has stressed on many occasions that Article 1 of Protocol No. 1 to the Convention cannot be interpreted as imposing any general obligation on the Contracting States to cover the debts of private entities (see, *mutatis mutandis*, *Shestakov*, cited above, and *Scollo*, cited above, § 44; and see in particular the Court's reasoning in *Anokhin v. Russia* (dec.), no. 25867/02, 31 May 2007).

112. However, the Court has also held that in certain circumstances Article 1 of Protocol No. 1 may require "measures which are necessary to protect the right of property ..., even in cases involving litigation between individuals or companies" (*Sovtransavto Holding*, cited above, § 96). This principle has been extensively applied in the context of enforcement proceedings against private debtors (see, *Fuklev*, cited above, §§ 89-91; *Kesyan*, cited above, §§ 79-80; see also *Kin-Stib and Majkić v. Serbia*, no. 12312/05, § 84, 20 April 2010; *Marčić and Others v. Serbia*, no. 17556/05, § 56, 30 October 2007; and, *mutatis mutandis*, *Matheus v. France*, no. 62740/00, §§ 68 et seq., 31 March 2005).

113. In the case of *Blumberga v. Latvia* (no. 70930/01, § 67, 14 October 2008) the Court held: "When an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained". It follows that the measures which the State can be required to take in such a context can be preventive or remedial.

114. As to the remedial measures which the State can be required to provide in certain circumstances, they include an appropriate legal mechanism allowing the aggrieved party to assert its rights effectively. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the existence of procedural positive obligations under this provision was recognised by the Court both in cases involving State

authorities (see *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV; see also *Zehentner v. Austria*, no. 20082/02, § 73, 16 July 2009) and in cases between private parties only (as in the case at hand). Thus, in a case belonging to the latter category the Court held that States were under an obligation to afford judicial procedures that offered the necessary procedural guarantees and therefore enabled the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons (*Sovtransavto Holding*, cited above, § 96; see also *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I, and *Freitag v. Germany*, no. 71440/01, § 54, 19 July 2007).

115. Finally, the Court reiterates that, in assessing compliance with Article 1 of Protocol No. 1, it must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are practical and effective. It must look behind appearances and investigate the realities of the situation complained of (see *Plechanow v. Poland*, cited above, § 101).

(b) Application to the present case

116. At the outset the Court observes that the applicant suffered significant losses as a result of the liquidator's deliberate and unlawful actions. This was confirmed by the Russian courts. The Court, however, reiterates that States cannot be held directly responsible for the debts of private companies or the faults committed by their managers (or by insolvency liquidators, as in the case at hand). In the present case, by depositing his money with a private bank the applicant assumed certain risks, including those related to mismanagement and even fraud. Hence, it was not for the State to bear any civil liability for the liquidator's unlawful actions.

117. The Court notes, however, that in the present case the liquidator's wrongdoings were serious and gave rise to substantial claims that were acknowledged by the domestic courts. Moreover, they occurred in an area where the State's negligence in combating malfunctioning and fraud could have devastating effects on the State's economy, thereby affecting a large number of individual property rights. Under these circumstances, the Court considers that it is part of the States' duties under Article 1 of Protocol No. 1 at least to set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and have them enforced. Indeed, by failing to do so a State would seriously fall short of its obligation to protect the rule of law and prevent arbitrariness. The Court will therefore examine whether the respondent State complied with this obligation in the present case, by opening adequate legal avenues for the applicant to assert his rights and creating an appropriate legal forum for that purpose.

118. As regards any preventive measures which the State could have been required to take, the Court reiterates that it does not have the jurisdiction *ratione temporis* in this case to examine what could have been done by the State to avoid the unlawful distribution of the bank's assets by the liquidator in 1996, since the Convention entered into force in respect of Russia only on 5 May 1998. However, the Court may ascertain if any remedial mechanisms were, in 1998 and 1999, capable of redressing the wrong done to the applicant by the liquidator's unlawful actions, and, if such mechanisms existed, why they were not effective in the applicant's case.

(i) Existence of adequate legal avenues

(α) Claim against the bank

119. The Court observes that the applicant attempted twice to have his rights restored. In 1998 he brought proceedings against the liquidator as manager of the bank, relying on the provisions of the Insolvency Act, which provided for judicial supervision of the liquidator's actions (see paragraph 46 above). In the final judgment of 12 November 1998 the Federal Commercial Court for the North Caucasus satisfied his claims and ordered the liquidator to provide redress. However, this judgment was not enforced since the distribution of money to the "privileged" creditors had left the bank with virtually no assets and no new assets were discovered. Thus, that remedy proved to be ineffective and incapable of redressing the wrong done to the applicant. Consequently, the only remaining avenue was a tort action for damages against the liquidator.

(β) Tort action against the liquidator

120. It is common ground between the parties that, at the time, the applicant could have sued the liquidator personally for damages. This could have been done with reference to general provisions of Russian tort law. The Court observes that, prior to 1998, there was no specific legal norm establishing a liquidator's personal liability for mismanagement, or any constant case-law to that effect. The situation has changed since then, with the 1998 Insolvency Act providing in section 21(3) that creditors are entitled to seek compensation from the liquidator in respect of any damage that the latter may have caused to them by an action or omission in breach of the law. The Court, however, is prepared to accept the Government's argument that section 21 of the 1998 Act did not introduce the liquidator's personal liability into Russian law but simply confirmed its existence. It follows that, at the time, Russian law provided for the possibility of suing the liquidator for damages, at least in theory. The Court must now examine whether it was effective in the circumstances of the case.

(ii) Effectiveness of the existing legal avenue

121. The Government argued that the law entitled an aggrieved creditor to seek compensation from the liquidator personally but that the applicant had failed to do so properly, for two reasons. Firstly, by going before the commercial court instead of a court of general jurisdiction the applicant had brought proceedings in the wrong court. In support of this argument they referred to the decision of the Supreme Commercial Court of 17 April 2001. Secondly, the applicant had introduced his claim prematurely, before the closure of the insolvency procedure.

(α) Whether the applicant brought proceedings before the competent court

122. On the question whether the applicant brought proceedings before the competent court, the Court acknowledges that the domestic courts are in principle better placed to interpret national legislation. It observes in this connection that both cases against the liquidator, which ended in 1998 and 1999 respectively, were examined by the commercial courts. However, in 2001 the Supreme Commercial Court annulled the results of the 1999 proceedings on the ground that since the applicant had sought compensation from the liquidator in person (and not from the liquidator acting as manager of the bank), his claims ought to have been examined by the courts of general jurisdiction. The Court is not convinced that in the circumstances of the present case the applicant could have been aware of the competence of the courts of general jurisdiction to hear his case at the relevant time.

123. Indeed, the Code of Civil Procedure at the time established that pecuniary disputes between an individual and a company should be heard by a court of general jurisdiction (see paragraph 52 above). However, the Insolvency Acts of 1992 and 1998, as well as the Code of Commercial Procedure and the Banks Insolvency Act of 1999 (which appeared to be *lex specialis*) established a different rule, namely that all disputes arising out of insolvency procedures fell within the jurisdiction of the commercial courts (see paragraphs 53 et seq. above). Neither of these Acts distinguished between claims of creditors directed against the liquidator as manager of the insolvent company and those directed against him as an individual wrongdoer.

124. Moreover, the Government did not refer to any case-law, contemporary to the events at issue, which would confirm the existence of such a distinction in Russian law. The Government cited the judgment of the Constitutional Court of 12 March 2001 (no. *4-P*). However, that judgment postdates the events at issue. Furthermore, the Constitutional Court only stated that where a commercial court refused to examine a complaint by an individual creditor for lack of jurisdiction, such creditors could turn to the courts of general jurisdiction. At the same time, the Constitutional Court emphasised that the provisions of the Insolvency Act did not contain "any clause that would prevent commercial courts from

giving decisions that enable[d] the persons concerned to secure in full their right to judicial protection in the context of insolvency procedures".

125. Finally, the Court notes that if the applicant did make a mistake, it was not evident either to the parties or to the representative of the Central Bank of Russia who participated in the 1999 proceedings. What is more, the commercial courts at three instances considered that they had jurisdiction to hear the case. Only in 2001 was the "jurisdictional" ground raised under the supervisory review procedure, following the communication of the case by the Court to the Russian Government, with the result that all previous decisions by the commercial courts (of 4 February, 31 March and 9 June 1999) were quashed.

126. It follows that the rules on the jurisdiction of the relevant courts at the time were unclear and that the applicant acted reasonably by taking his case to a court which appeared to have jurisdiction. In these circumstances the Court considers that the applicant could not be expected, as a result of the quashing in 2001 of the 1999 judgments by way of supervisory review, to pursue an identical claim before a different court. When the applicant lodged his application with the Court he had good reason to believe that he had used an appropriate remedy and that the judgment of 9 June 1999 had put an end to his case. Consequently, if the applicant did go before a court that lacked jurisdiction to adjudicate his case, this mistake cannot reasonably be held against him.

(β) Whether the proceedings instituted by the applicant were premature

127. The Government also argued that the applicant's claim had not been satisfied because the liquidation procedure was still pending. As long as the bank was in existence, there was still a possibility that the original award could be paid from the bank's remaining assets. Thus, if the courts had awarded damages to the applicant, he would have been entitled to recover the same amount twice, both from the bank and from the liquidator (the "double recovery" argument). However, after completion of the liquidation procedure the applicant was indeed entitled to bring further proceedings and seek due compensation. In sum, the Government suggested that the applicant had only been precluded temporarily from recovering damages from the liquidator, for as long as the liquidation procedure was ongoing. To address this argument the Court will now examine the reasoning of the domestic courts in the 1999 proceedings.

128. The Grand Chamber observes that the judgment of 9 June 1999 clearly relied on the "double recovery" argument. Essentially, from 17 June 1999, the date when the liquidation of the bank was approved by the commercial court, the applicant had the possibility of proceeding against the liquidator in tort proceedings alleging negligence and breach of duty in the discharge of his official functions. However, the applicant did not use such a remedy, for reasons which remain unknown. Whatever they were, there was

nothing in the judgment of 9 June 1999 that would have prevented him from suing the liquidator once the liquidation proceedings had ended.

129. In the Court's opinion, the "double recovery" argument relied on by the domestic courts is not without significance. For if the applicant had successfully sued the liquidator and had then gone on, subsequently, to recover the original court award against the bank, he would, effectively, have been compensated twice for what was, essentially, the same financial loss. Hence, there was a rationale in the court's refusal to deal with the applicant's claims against the liquidator, while the liquidation procedure itself was still pending. Even if, in the circumstances of the case, the possibility of recovering the original bank award was remote, the general rule applied by the court in the judgment of 9 June 1999 cannot be dismissed as having no reasonable justification.

130. Admittedly, this rule meant that an aggrieved creditor had to wait until the debtor company had ceased to exist before he could claim damages from the liquidator in person. The Court would point out, however, that in cases arising from individual petitions the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see, *mutatis mutandis*, among many others, *Taxquet v. Belgium* [GC], no. 926/05, § 83, ECHR 2010). In the present case the bank was liquidated on 17 June 1999, that is, eight days after the courts had pronounced on the applicant's claims against the liquidator. Considered globally, only a short period of time elapsed between the applicant's knowledge that the bank had no assets with which to discharge the court award in his favour as found in the judgment of 12 November 1998 and the date when it became possible for him to sue to the liquidator in damages.

131. Furthermore, the Court reiterates that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one (see, among many other authorities, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI), especially in a situation where, as in the present case, the State has to have regard to competing private interests in horizontal relations in an area, such as, bankruptcy proceedings.

132. In sum, the law provided for a "deferred" compensatory remedy but the applicant failed to use it when it became available. Given that the inability to seek redress against the liquidator was of a limited duration and existed only for the time of the insolvency proceedings, and in the absence of any argument by the applicant as to why this might have been excessive in the circumstances, the Court considers that such limitation did not affect the essence of the applicant's rights under Article 1 of Protocol No. 1 and remained within the State's margin of appreciation.

133. It follows that the legal framework put in place by the State provided the applicant with a mechanism to have his rights under Article 1

of Protocol No. 1 protected. Consequently, the Court finds that the State complied with its positive obligations under this provision. In view of the above, it is not necessary to consider separately the Government's preliminary objection.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* the Government's preliminary objection as to the non-exhaustion of domestic remedies;

2. *Holds*, by sixteen votes to one, that the Court has jurisdiction *ratione temporis* to examine the applicant's complaints, in so far as they relate to the proceedings which took place in 1998 and 1999;

3. *Holds*, by twelve votes to five, that there has been no violation of Article 1 of Protocol no. 1 to the Convention and that it is not necessary to consider the Government's preliminary objection.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 April 2012.

Johan Callewaert	Nicolas Bratza
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Bratza;

(b) partly dissenting opinion of Judge Gyulumyan;

(c) dissenting opinion of judges Lorenzen, Fura, Popović, Malinverni and Raimondi.

N.B.
J.C.

CONCURRING OPINION OF JUDGE BRATZA

With some hesitation I have voted in favour of the finding that the applicant's rights under Article 1 of Protocol No. 1 were not violated in the present case. My hesitation relates not to the question whether the liquidator was to be seen as a public official or as to the nature and extent of the State's positive obligations in the context of insolvency proceedings, on both of which points I fully share the view of the majority of the Court, but to the question whether those positive obligations were met in the circumstances of the present case.

The positive obligations under Article 1 of Protocol No. 1 were interpreted in the case of *Sovtransavto Holding v. Ukraine* (no. 48553/99, ECHR 2002-VII) as meaning in particular that States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private parties, including, as here, claims to recover by way of damages an amount due to the applicant. The requirement is not merely that there should exist a legislative framework but that there should be a degree of clarity and coherence in the law and procedures to be followed in order to avoid, in so far as possible, any legal uncertainty and ambiguity for the litigants concerned. In the *Sovtransavto* case itself, it was the difference of approach to the application and interpretation of domestic law between the various levels of jurisdiction, which made possible the repeated re-opening of the proceedings in issue and which created permanent uncertainty as to the lawfulness of the decisions in question, that led in part to the Court's finding that Article 1 of Protocol No. 1 had been violated. In *Plechanow v. Poland* (no. 22279/04, 7 July 2009), it was the lack of clarity as to the identity of the appropriate authority to be sued, following fundamental changes in the competence of the various authorities at the local and State administrative levels, with the consequent shifting to the applicant of the duty to identify the correct defendant to the proceedings, which was found by the Court to be disproportionate and to upset any fair balance, in breach of Article 1 of Protocol No. 1.

There was indisputably a lack of clarity in the present case, both as to the issue of whether – and, if so, when – a claim for damages lay against a liquidator for mismanagement in settling the claims of the creditors of the bank, and as to whether any such claim should be brought in the commercial court or in the courts of general jurisdiction.

I do not attach much importance to the latter point or to the fact that in the supervisory review proceedings the Supreme Commercial Court found that the dispute between the applicant and the liquidator was not related to the insolvency procedure as such and should have been submitted to the courts of general jurisdiction. As noted in the judgment, not only did the

parties to the 1999 proceedings and the representative of the Central Bank of Russia appear to share the view of the applicant that the proceedings had been brought in the appropriate court, but the commercial courts themselves, at three instances, considered that they had jurisdiction to hear the case. Had the final decision of the Federal Commercial Court been in favour of the applicant and had it been set aside on supervisory review, an issue might well have arisen under the Protocol. But this was not the case, the applicant's claim having been rejected at each of the three instances.

The central question is whether the legal situation, as analysed and applied by the commercial courts, was so uncertain as to deprive the applicant of effective protection for his property rights. The judgment of the Court of Appeal of 31 March 1999 rejecting the applicant's claim against the liquidator was based on two grounds: the risk of "double recovery" if damages were awarded against the liquidator while the liquidation proceedings themselves were still pending and the fact that the Insolvency Act extended only to claims which arose while the bank was operating and not to those arising during the insolvency procedure. However, as is pointed out in the judgment, only the "double recovery" ground was expressly upheld by the Federal Commercial Court in its judgment of 9 June 1999. I do not find such a decision to have been arbitrary or unreasonable (cf. *OBG Ltd. and Others v. the United Kingdom*, (dec.) no. 48407/07, § 90, 29 November 2011). Nor do I find unreasonable the commercial courts' conclusion that the law did not provide for compensation for non-pecuniary damage. The legal position may have been unclear until the determination of the Federal Commercial Court. This is hardly surprising having regard to the fact that the decisions were taken at a time when the insolvency law and procedure were in a state of development and transition. However, viewed as a whole, I do not find such legal or procedural uncertainty in the present case as to deprive the applicant of effective protection of his property rights, the more so since it would have been open to the applicant to bring fresh proceedings against the liquidator when the liquidation proceedings were formally closed, an event which occurred shortly after the judgment of 9 June 1999.

PARTLY DISSENTING OPINION OF JUDGE GYULUMYAN

I disagree with the majority's finding that the Court was competent to consider this case *ratione temporis*.

The Court has repeatedly held that in cases where the interference pre-dates ratification, while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State (see, among other authorities, *Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III). The Court has also held that "divorcing the domestic courts' decisions" from the events which gave rise to the relevant proceedings would amount to giving retroactive effect to the Convention, contrary to general principles of international law (see *Jovanović v. Croatia* (dec.), no. 59109/00, 28 February 2002). In the present case the interference with the applicant's "possessions" took place in 1996, when the liquidator took the money destined for the applicant and paid it to creditors who had no right to it. It was an instantaneous act, which occurred before the Convention entered into force in respect of Russia (5 May 1998). It is probable that the applicant, in such circumstances, was allowed to claim compensation from the liquidator personally. I admit that such a claim existed in Russian law at that time – at least, this is what the Government acknowledged in their observations. However, having read the judgments of 1999 I was left with the impression that the domestic courts had not been certain whether such a right really existed. It follows that the crux of the present case is not the proceedings which took place in 1999, but rather the substantive legislation in force at the time of the interference, namely in 1996. That legislation was probably not sufficiently clear and the applicant's action against the liquidator in 1999 was thus doomed to fail. Be that as it may, the question of the alleged deficiency of the substantive rules of law which existed in 1996 escapes the Court's jurisdiction *ratione temporis*.

DISSENTING OPINION OF JUDGES LORENZEN, FURA, POPOVIĆ, MALINVERNI AND RAIMONDI

In the present case the majority voted for a finding that there had been no violation of Article 1 of Protocol No. 1 as the State was considered not to have failed to fulfil its positive obligations under that Article. We are unable to agree with that conclusion for the following reasons.

As is stated in the judgment, the Court has, in its case-law, held that Article 1 of Protocol No. 1 may require "measures which are necessary to protect the right of property... even in cases involving litigation between individuals or companies" (paragraph 112) and that the State has a positive obligation, also in respect of interferences by a private individual, "to ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained" (paragraph 113). Furthermore, the Court has held that even though Article 1 of Protocol No. 1 contains no explicit procedural requirements, States are under an obligation to provide "judicial procedures that [afford] the necessary judicial guarantees and [enable] the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons" (paragraph 114).

The present judgment has confirmed these findings and we cannot but agree with this conclusion. We also agree with the point that in the circumstances of a case like the present one the State is obliged under Article 1 of Protocol No. 1 "at least to set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and have them enforced" (paragraph 117).

The judgment has further stated that in Russian law, as it stood at the relevant time, the only avenue to be considered was a tort action for damages against the liquidator. The applicant did in fact try to obtain compensation from the liquidator and chose to pursue his claim before the commercial courts. The claim was, however, refused as unjustified. Only after the complaint to the Court had been communicated to the Government were the judgments of those courts annulled for lack of jurisdiction. Like the majority, we can only conclude that the applicant in the circumstances of the present case could not have been aware of the competence of the courts of general jurisdiction to hear his case (paragraph 122), that the rules on the jurisdiction of the relevant courts at the time were unclear, and that the applicant acted reasonably by taking his case to a court which appeared to have jurisdiction (paragraph 126).

In spite of the above, the majority have found that the proceedings instituted by the applicant were premature and that after the bank had finally

been liquidated in June 1999 he should have used the possibility of proceeding against the liquidator for negligence before the courts of general jurisdiction. In that respect we disagree with the majority.

Even though, in theory, the applicant might have been able to sue the liquidator in tort before the courts of general jurisdiction, the legal situation was, in our opinion, so unclear as to deprive him of any practical redress for his grievances. The majority seem to have attached considerable importance to the "double recovery" argument upon which the judgment of 9 June 1999 relied. Apart from the fact that none of the commercial courts indicated that the applicant could or should have sued the liquidator before the courts of general jurisdiction, the "double recovery" argument was not the only one relied upon by the commercial courts. The Government themselves acknowledged that there had been other reasons for dismissing the applicant's tort claim. Thus the judgment of 31 March 1999 (on appeal) stated that the Insolvency Act did not allow claims of creditors to be satisfied if they had not come into existence when the bank was operating but only during the insolvency procedure. The court of appeal thus did not make a distinction between the bank's original debt and the liquidator's personal liability in tort. In so doing it rendered the liquidator immune from any liability for his conduct, even if the law, as explained by the Government, provided for such liability. Even though in its judgment of 9 June 1999 the court of cassation relied on the "double recovery" argument, it upheld the judgment of the court of appeal in full, stating explicitly that there was no reason to modify it. Under these circumstances and having regard to the unclear legal situation at the time, the applicant was entitled to believe that his claim had been dismissed on the merits rather than as being premature and that his case had thus been closed. This is, in our opinion, further confirmed by the fact that it was only after the complaint to the Court had been communicated that it was established that the commercial courts had no jurisdiction to hear the claim against the liquidator.

Moreover, besides claiming the amount of the original court award, the applicant also sought compensation for non-pecuniary damage and loss of time. However, the courts found that the law did not provide for any compensation of that kind and dismissed his complaints. It thus appears that, whatever the fault of the liquidator, his responsibility would in any event have been limited to the amount of the original debt. The Government have not provided any information on case-law which would allow the Court to hold otherwise. That placed the aggrieved creditor in a very unfavourable position, especially in a context of a rampant inflation, as was the case in Russia at the relevant time, combined with the fact that he had to await the final termination of the liquidation after a lengthy insolvency procedure.

Based on the foregoing, we can only come to the conclusion that Russian law at the relevant time did not provide a sufficient legal framework in order to protect the applicant's rights under Article 1 of Protocol No. 1. Consequently we find that the State has failed to fulfil its positive obligations under that Article, which has accordingly been violated.