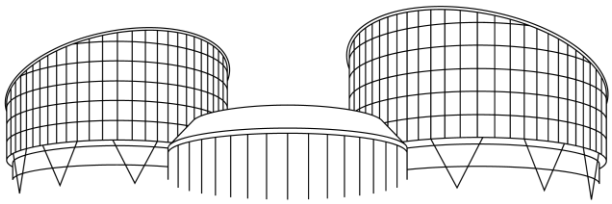

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF OLEYNIKOV v. RUSSIA

(Application no. 36703/04)

JUDGMENT

STRASBOURG

14 March 2013

FINAL

09/09/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Oleynikov v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 12 February 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 36703/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Vladimir Borisovich Oleynikov ("the applicant"), on 2 September 2004.

2. The Russian Government ("the Government") were initially represented by Ms V. Milinchuk, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their new Representative, Mr G. Matyushkin.

3. On 10 January 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

4. The Government objected to the joint examination of the admissibility and merits of the application. Having considered the Government's objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in Khabarovsk.

6. On 19 May 1997 the applicant lent the Khabarovsk Office of the Trade Counsellor of the Embassy of the Democratic People's Republic of

Korea ("the DPRK Trade Counsellor") 1,500 United States dollars (USD). The money was to be repaid by 29 May 1997. A receipt of 19 May 1997 on the letterhead of the DPRK Trade Counsellor signed by Mr Chkhe Gym Cher reads as follows:

> "[This] receipt is given to the President of the private company Lord BV Oleynikov to the effect that the Khabarovsk Office of the Trade Counsellor of the DPRK Embassy has borrowed 1,500 (one thousand five hundred) US dollars converted into roubles.
>
> We undertake to repay the debt not later than 29 May [and] we pledge the Toyota Camry car, registration plate no. KhBB 1799 (*ХББ 1799*), engine no. 0073653, chassis no. 0062459, [together] with a complete set of documents for the car. In case of a failure to repay [the debt] within the indicated term, we shall pay 1% for each day of the delay."

7. After the DPRK Trade Counsellor failed to repay the debt, in 1999-2000 the applicant sent several letters of claim which went unanswered. The applicant's counsel also sent a letter of claim to the DPRK Trade Counsellor on 13 April 2001 and to the DPRK Embassy on 27 April 2001, which also went unanswered.

8. On 11 September 2001 the applicant's counsel wrote to the Russian Ministry of External Affairs asking for assistance in settling the matter.

9. On 29 January 2002 the Ministry of External Affairs replied to the applicant that the DPRK Trade Counsellor was a constituent unit of the DPRK Embassy and, therefore, an organ of the DPRK which acted on its behalf. The DPRK Trade Counsellor thus enjoyed immunity from suit and immunity from attachment or execution in accordance with Article 435 of the 1964 Code of Civil Procedure. The Ministry of External Affairs advised the applicant that, should he decide to lodge a claim with a court, he would have to obtain consent to the examination of the case from a competent North Korean authority.

10. On 8 July 2002 the applicant wrote to the DPRK Embassy and asked for its consent to the examination of his claim against the DPRK Trade Counsellor by the domestic courts. The letter was received by the Embassy on 19 July 2002. It appears that the applicant received no reply.

11. On an unspecified date the applicant lodged a claim with the Supreme Court of Russia. On 21 February 2003 the Supreme Court returned the claim without examination on the grounds that it should have been lodged before a district court.

12. On 9 February 2004 the applicant lodged a claim against the DPRK with the Khabarovsk Industrialniy District Court. He sought repayment of the debt with interest. He claimed, furthermore, that Russia was responsible for the actions of foreign diplomats within its territory.

13. On 12 February 2004 the District Court returned the claim without consideration on the grounds that under Article 401 of the 2002 Code of Civil Procedure a claim against a foreign State could only be brought upon the consent of its competent authorities. The applicant appealed.

14. On 16 March 2004 the Khabarovsk Regional Court upheld the decision on appeal. The court held:

> "[The DPRK Trade Counsellor] is a subdivision of the trade representation of the DPRK in Russia the legal status of which is governed by the Annex to the Treaty on Trade and Navigation between the USSR and the DPRK of 22 June 1960. According to Article 2 of the Annex, the trade representation is an organ of the State (the DPRK) acting in its name. Therefore, taking into account the equality of States as a principle of international law, the trade representation as an organ of public authority of a sovereign State is entitled to judicial immunity as well as to immunity from measures of securing a suit and execution. The said immunities are based on State sovereignty, which does not allow a State to be subject to coercive measures of any kind. The principle of judicial immunity of a foreign state is enshrined in Article 401 § 1 of the Code of Civil Procedure, according to which lodging a claim in a court of the Russian Federation against a foreign State, the involvement thereof in court proceedings in the capacity of a defendant or of a third party, the seizure of property belonging to a foreign State and situated within the territory of the Russian Federation, taking other measures for securing of a suit, and levying execution upon such property by means of enforcement of judicial decisions, are allowed only upon the consent of the competent agencies of the State in question, unless otherwise provided by an international treaty of the Russian Federation or by a federal law.
>
> Therefore, [a] person may only lodge a claim against a foreign State upon the prior consent of the State. If [a] claim against a foreign State is not supported by ... documents confirming its consent to the examination of the case in court, [court] proceedings will not be instituted. As [Mr] V.B. Oleynikov failed to furnish [documents confirming] the consent of the [DPRK] to the examination of the dispute in court together with [his claim], the judge could not accept the claim because of the bar to [lodging such a claim before] a court. As the said bar is [not absolute], the judge returned the claim to [Mr] V.B. Oleynikov on valid grounds, having indicated how the circumstances that prevented the institution of the proceedings could be remedied.
>
> [Mr] V.B. Oleynikov's arguments that the DPRK Embassy does not wish to reply to his and his counsel's requests [and] is evading payment of the debt, on the basis of which [he submits that] it is for the court or the judge to request the DPRK's consent to the examination of the case, may not be considered as grounds for setting aside the [decision of the District Court], as they contravene the provisions of the international treaty between the USSR and the DPRK of 22 June 1960 and Article 401 § 1 of the Code of Civil Procedure."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic legislation

15. Article 127 of the Civil Code refers to the Law on State Immunity, which has not been adopted to date. The question is thus resolved by the courts on the basis of the relevant Codes of Procedure, with reference to the provisions of various bilateral and multilateral treaties.

1. Civil proceedings in courts of general jurisdiction

16. Article 435 of the 1964 Code of Civil Procedure in force until 1 February 2003, based on absolute immunity, provided, in so far as relevant:

> "[F]iling a suit against a foreign State, securing of a suit or levying execution upon the property of a foreign State situated in the USSR may only be allowed upon the consent of the competent agencies of the respective State."

17. Article 401 § 1 of the 2002 Code of Civil Procedure in force from 1 February 2003, reinstated absolute immunity of a foreign State. It reads as follows:

> "Filing a suit against a foreign State in a court of the Russian Federation, the involvement thereof in court proceedings in the capacity of a defendant or of a third party, the seizure of property belonging to a foreign State and situated within the territory of the Russian Federation, taking other property measures for securing of a suit, and levying execution upon such property by means of enforcement of judicial decisions, shall only be allowed upon the consent of the competent agencies of the State in question, unless otherwise provided by an international treaty of the Russian Federation or by a federal law."

2. Civil proceedings in commercial courts

18. Article 213(1) of the 1995 Code of Commercial Procedure in force until 1 September 2002, provided for absolute immunity:

> "Filing a suit in a commercial court against a foreign State, the involvement thereof in court proceedings in the capacity of a third party, the seizure of property belonging to a foreign State and situated within the territory of the Russian Federation, and taking against it other measures for securing a suit, and levying execution upon such property by means of enforcement of a decision of a commercial court, shall only be permitted with the consent of the competent agencies of the respective State, unless otherwise provided by federal laws or by international treaties of the Russian Federation."

19. Article 251 of the 2002 Code of Commercial Procedure in force from 1 September 2002, endorsed restrictive immunity. It reads as follows:

> "1. A foreign State, **acting in the capacity of a bearer of authority** [*emphasis added*], shall enjoy judicial immunity with respect to a suit filed against it with a

commercial court in the Russian Federation, its involvement in court proceedings in the capacity of a third party, the seizure of property belonging to a foreign State and situated on the territory of the Russian Federation, and the taking against it by the court of other measures of securing a suit and property interests. Levying execution upon such property by means of enforcement of a judicial act of a commercial court shall only be permitted with the consent of competent agencies of the respective State, unless otherwise provided by international treaty of the Russian Federation or by a federal law.

2. The judicial immunity of international organisations shall be determined by international treaty of the Russian Federation and by federal law.

3. A waiver of judicial immunity shall be effected according to the procedure provided for by the law of the foreign State or by the rules of the international organisation. In this instance, the commercial court shall consider the case according to the procedure established by the present Code".

3. Constitution of the Russian Federation

20. Article 15 of the Constitution provides, insofar as relevant:

"4. The generally recognised principles and norms of international law and the international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes other rules than those provided for by the law, the rules of the international treaty shall apply."

B. Judicial practice

1. Ruling of the Constitutional Court on Article 435 of the 1964 Code of Civil Procedure

21. Article 435 of the 1964 Code of Civil Procedure was examined by the Constitutional Court in its ruling of 2 November 2000. The claimant, Ms Kalashnikova, a former employee of the information service of the United States Embassy in Russia, was dismissed under Article 33 section 1(2) of the 1971 Labour Code of the Russian Federation (non-conformity of the employee with the post held due to insufficient qualification or state of health, preventing further fulfilment of the work). Following her dismissal she instituted court proceedings seeking reinstatement and damages. In a ruling of 27 March 2000 the court of first instance rejected the claim, having applied Article 435(1) of the 1964 Code of Civil Procedure, as the claimant had failed to present any evidence of the United States' consent to submit to the jurisdiction of the court. The Moscow City Court upheld the ruling on appeal. In her complaint to the Constitutional Court, Ms Kalashnikova argued that Article 435 of the 1964 Code of Civil Procedure had violated her constitutional right to judicial defence.

22. The Constitutional Court noted that the right to engage in individual labour disputes was provided in Article 37(4) of the Constitution and the procedure for the examination of claims for reinstatement was governed by Chapter XIV of the Labour Code, while application of the provisions of the 1964 Code of Civil Procedure was of subsidiary nature, intended to fill in gaps in the procedural rules of labour legislation. It further observed that the purpose of Article 435(1) was to ensure State immunity in accordance with generally recognised principles and norms of international law and international treaties of the Russian Federation.

23. The Constitutional Court found that "when considering the case of [Ms] Kalashnikova, the courts of general jurisdiction did not pay attention to the fact that the employer – the Embassy of the United States as an agency of the accrediting State – applied the legislation of the Russian Federation ..., and without requesting necessary documents refrained from investigating the issue of whether such an application could be regarded as the United States' waiver of jurisdictional immunity in this particular case". On these grounds it reached the conclusion that: "the formalistic application of Article 435(1) of the 1964 Code of Civil Procedure by the courts of general jurisdiction, which refused to accept the claim of [Ms] Kalashnikova on the basis of this article, led to an inadmissible limitation of the claimant's rights with regard to an individual labour dispute ... and thus to a violation of the right to judicial defence provided for in Article 46(1) of the Constitution of the Russian Federation".

24. However, the Constitutional Court did not examine Ms Kalashnikova's complaint on the merits. It found that her rights had not been violated by Article 435(1) of the 1964 Code of Civil Procedure, but rather by its application by the domestic courts, which fell outside its competence. At the same time, the Constitutional Court stated that the Article was to be applied henceforth "taking into account the legal position set forth by the Constitutional Court in the present ruling".

2. Information Letter of the Presidium of the Supreme Commercial Court of 18 January 2001

25. The application of the State immunity rule in commercial proceedings was addressed by the Presidium of the Supreme Commercial Court in an Information Letter of 18 January 2001. By way of information letters the Supreme Commercial Court provides lower courts with instructions on the interpretation and application of domestic law.

26. The Information Letter firstly referred to a case where a Russian construction company had filed a claim against a foreign embassy for recovery of a debt arising under a contract concerning the construction of a hotel attached to the embassy in Moscow. The commercial court had granted the claim. However, the Supreme Commercial Court had set aside the decision and remitted the case for fresh consideration. The commercial

court was instructed to review the issue of State immunity, taking into account that construction of the hotel was for the public, and non-commercial, activity of the foreign State in Russia, and was therefore instructed to consider termination of the proceedings under Article 213(1) of the 1995 Code of Commercial Procedure.

27. On the basis of its findings in the above case, the Presidium of the Supreme Commercial Court made the following general recommendation: "A commercial court shall terminate proceedings in a case concerning an investment dispute, the defendant in which is a foreign State acting in the capacity of a sovereign".

28. The second case referred to in the Information Letter also concerned a foreign embassy and a Russian construction company involved in a dispute arising out of a construction contract. However, in this case the proceedings had been initiated by the embassy and the construction company had filed a counter-claim. The Court of Cassation had held that bringing a claim constituted an implied waiver of immunity and therefore that the embassy of a foreign State was not immune with respect to a counter-claim.

29. The recommendation of the Presidium of the Supreme Commercial Court based on the above case reads as follows: "A commercial court shall accept a claim in a commercial dispute, the defendant in which is a person entitled to international immunity".

C. The President's stance on State Immunity

30. State immunity was touched upon in the Opinion on the Draft Federal Law on the Administration of State Foreign Financial Assets Inherited by the Russian Federation, sent by the President of the Russian Federation, B N Yeltsin, to the Chairman of the State Duma, G N Seleznev, and published in the Rossiyskaya Gazeta on 13 May 1998 ("the Opinion").

31. With regard to certain provisions relating to State immunity which were included in the Draft Federal Law under discussion, the Opinion states that "foreign State property enjoys functional immunity". The statement is further detailed as follows:

> "If a State uses its ownership for the purposes of ensuring its sovereignty or fulfilling State political functions, that is, as a subject of international law, for example, for the maintenance of diplomatic and consular representations, this property always enjoys immunity against the jurisdiction of the State of its location. However, if the State (through specially empowered agencies) takes part in property turnover or in commercial activity, then it is regarded as a foreign private person and its State ownership does not enjoy immunity. The turnover of such property is regulated by norms of international private law and by legislation of the country where the property is located, the foreign State with respect to the country of location of the property acting on the basis of equal rights with other participants of these relations – with foreign juridical and natural persons. This approach has been consolidated in the

European Convention on State Immunity, 16 May 1972, which, in accordance with generally recognised international practice, the Russian Federation may regard as a codified digest of customary norms of international law."

32. State immunity was also referred to in letter no. Pr-795 of 23 June 1999 sent by the President of the Russian Federation, B N Yeltsin, to the Chairman of the Federal Assembly, E S Stroev ("the Letter"). The Letter substantiates the rejection by the President of the Federal Law on the Administration of the Russian Federation's Property Located Abroad. Paragraph 6 of the Letter states:

"The Civil Code of the Russian Federation (Article 127) provides that the specific responsibilities of the Russian Federation and the subjects of the Russian Federation in relations regulated by civil legislation with the participation of foreign juridical persons, citizens and States are to be determined by the Law on the Immunity of the State and of its Property.

Therefore, it is hardly legitimate to include Article 8 on the immunity of the Russian Federation's property located abroad in the Federal Law. Moreover, it should be noted that the concept of absolute immunity of a foreign State and of its property was reflected in Article 8 of the Federal Law.

This concept does not find recognition in either the legislation of the Russian Federation (Article 213, 1995 Code of Commercial Procedure of the Russian Federation, Articles 22 and 23, Federal Law on Production Sharing Agreements), or in international treaties of the Russian Federation (treaties on the encouragement and mutual protection of capital investments).

It should be taken into consideration that in modern circumstances absolute immunity may not be realised in practice and its adoption in the legislation of the Russian Federation will only impede the development of civil law relations with State participation."

III. BILATERAL TREATIES ON TRADE REPRESENTATIONS

33. Following the establishment of the foreign trade monopoly in the Soviet Union by the Decree on Nationalisation of Foreign Trade of 22 April 1918, the State, through the USSR Ministry of Foreign Trade and its predecessors, carried out and controlled foreign trade. It established the types of entities entitled to participate in foreign trade and set limits on their participation, such as the nature of transactions they could enter into, the goods they could trade and import and export volumes. Trade with foreign States was to be carried out by Trade Representations, which constituted agencies of the Ministry of Foreign Trade.

34. In the exercise of the foreign trade monopoly, the Soviet Union entered into numerous treaties on the legal status of Soviet Trade Representations in other States. Treaties concluded by the USSR with

socialist States provided for the mutual establishment of Trade Representations, such as the following treaty concluded with the DPRK.

35. According to Article 13 of the Treaty on Trade and Navigation between the USSR and the DPRK of 22 June 1960, either party can open a trade representation in the capital of the other party. The legal status of the representation is governed by the Annex to the Treaty.

36. The Annex on the Legal Status of the USSR Trade Representation in the DPRK and the DPRK Trade Representation in the USSR contains four Articles. Article 1 provides that the Trade Representations would contribute to the development of trade between the two States. According to Article 2 the Trade Representation is a constituent part of the Embassy of its State. The trade representative and his/her deputies enjoy full diplomatic immunities and the premises of the Trade Representation enjoy extraterritoriality. The Trade Representation may open branches upon the parties' agreement.

37. The Annex further provides:

Article 3

"The Trade Representation acts on behalf of its Government. The Government is only responsible for the foreign trade transactions concluded or guaranteed by the Trade Representation in the State of sojourn and signed by a competent person.

Names of persons competent to perform legal acts on behalf of the Trade Representation, as well as the scope of the competence of each such person, shall be published in an official organ of the State of sojourn."

Article 4

"The Trade Representation shall enjoy all immunities belonging to a sovereign State which relate to foreign trade, with the following exceptions agreed upon by the parties:

(a) disputes arising out of foreign trade transactions concluded or guaranteed by the Trade Representation in accordance with Article 3 within the territory of the State of sojourn, in the absence of an arbitration agreement or an agreement [to submit to] a different jurisdiction, are subject to the jurisdiction of the courts of that State. At the same time, the courts cannot apply preliminary attachment measures;

(b) enforcement of final judgments that have entered into force against the Trade Representation with regard to such disputes is only allowed in respect of goods and claims outstanding to the credit of the Trade Representation."

38. The Treaty and the Annex remain in force for the Russian Federation.

IV. RELEVANT INTERNATIONAL LAW AND PRACTICE

39. The relevant provisions of the 1972 European Convention on State Immunity ("the Basle Convention") read as follows:

Article 4

"1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.

2. Paragraph 1 shall not apply:

in the case of a contract concluded between States;

if the parties to the contract have otherwise agreed in writing;

if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law."

40. Russia is not a party to the Basle Convention.

41. In 1979 the United Nations International Law Commission was given the task of codifying and gradually developing international law in matters of jurisdictional immunities of States and their property. In 1991 the International Law Commission adopted the Draft Articles on Jurisdictional Immunities of States and Their Property based on restrictive immunity, that is a distinction between acts of sovereign authority (*acte jure imperii*) and acts of a private law nature (*acte jure gestionis*). The Draft Articles that were used as the basis for the text adopted in 2004 dated back to 1991. The relevant part of the text then read as follows:

Article 2 – Use of Terms

"1. ...

(c) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of

the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction. ...”

Article 10 – Commercial transactions

“1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial transaction between States; or

(*b*) if the parties to the commercial transaction have expressly agreed otherwise.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:

(*a*) suing or being sued; and

(*b*) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.”

42. In December 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property. It was opened for signature on 17 January 2005**.** The final versions of Article 2 § 1(c) and 2 and Article 10, as set out in the Convention, read as follows:

Article 2 – Use of Terms

“1. ...

(c) “commercial transaction” means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (*c*), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the

contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction."

Article 10 – Commercial transactions

"1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial transaction between States; or

(*b*) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

(*a*) suing or being sued; and

(*b*) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected."

43. Russia signed the Convention on 1 December 2006. However, it has not ratified it yet.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

44. The applicant complained that the Russian courts' refusal to examine his claim and the DPRK's failure to give its consent to the examination of the claim by the Russian courts had constituted a violation of his rights guaranteed by Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

45. Article 6 of the Convention provides, in so far as relevant:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' observations

46. The Government expressed their doubts as to whether the application concerned a "genuine and serious" dispute. They pointed out, firstly, that in so far as the dispute had concerned a loan secured by a pledge, it was not clear why the applicant had never attempted to sell the pledged car so as to recover the debt and had not even mentioned it in his letter of claim. Secondly, in the receipt of 19 May 1997 it was not specified whether the money had been borrowed for the needs of the DPRK Embassy or for the personal needs of the Trade Counsellor. The Government observed that it was very rare for a foreign State to borrow money from a private party. Thirdly, the interest for failure to repay the loan in due time was extremely high. The Government also pointed out that the text of the receipt contained numerous spelling mistakes which cast doubt on its authenticity and that it was very difficult to establish whether the letterhead and the stamp were authentic. Lastly, the Government noted that the applicant had applied to the courts six years after the alleged failure to repay the debt – after the expiry of the three-year statutory time-limit. In their view, this demonstrated a lack of real concern on his part to achieve recovery of the alleged debt.

47. As regards the substance of the complaint, the Government submitted that the decisions of the domestic courts had reflected the generally recognised norms and principles of international law. Whilst the principle of restrictive immunity had been adopted by numerous States, its adoption was not universal and, therefore, the application of absolute immunity fell within the State's margin of appreciation.

48. The applicant maintained his complaint. He contended that the loan agreement had been entered into by the parties voluntarily and that the receipt was authentic. In his view, the Government's allegation that the terms of the transaction had been overly profitable for the applicant was "unreasonable". As regards the Government's argument concerning the applicant's failure to sell the car, he stated that the pledge of the car had not "corresponded to Russian laws or the actual facts". He stated that the DPRK Trade Counsellor had offered to pledge the car, which had been manufactured in 1970. However, it had been impossible to perfect the pledge, as under Article 339 of the Civil Code a pledge agreement to secure performance under a different contract is subject to notarial certification. Therefore, the pledge had been null and void and the applicant had never received the car in question. As for the Government's argument concerning his failure to apply to the courts before the expiry of the three-year statutory time-limit, the applicant submitted that before applying to the courts he had been trying to recover the debt through various organs of the DPRK and various domestic authorities.

B. The Court's assessment

1. Admissibility

(a) In so far as the complaint is lodged against the Democratic People's Republic of Korea

49. The Court reiterates that it can only examine applications directed against the States Parties to the Convention. Since the DPRK is not a party to the Convention, this part of the application is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

(b) In so far as the complaint is lodged against the Russian Federation

50. The Court reiterates that according to its well-established case-law the applicability of the civil limb of Article 6 § 1 requires the existence of "a genuine and serious dispute" over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. Thus, a claim submitted to a tribunal for determination must be presumed to be genuine and serious unless there are clear indications to the contrary which might warrant the conclusion that the claim is frivolous or vexatious or otherwise lacking in foundation (see, for example, *Benthem v. the Netherlands*, 23 October 1985, § 32, Series A no. 97, and *Rolf Gustafson v. Sweden*, 1 July 1997, § 38, *Reports of Judgments and Decisions* 1997-IV).

51. Turning to the facts of the present case, the Court accepts that the claim made by the applicant was of a civil nature, since it concerned repayment of a debt arising under a loan agreement, which constituted a civil transaction. The Court further notes that the validity of the loan agreement was never examined by the domestic courts, which returned the applicant's claim for recovery of the debt without examining it, having applied the principle of State immunity. In these circumstances, the Court may not substitute its findings for those of the domestic courts and, in the absence of such findings, cannot but presume that the dispute was "genuine and serious", as required by Article 6 § 1.

52. Accordingly, Article 6 § 1 of the Convention was applicable to the proceedings before the Russian courts.

53. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

54. The Court reiterates that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII).

55. However, the right of access to court secured by Article 6 § 1 is not absolute, but may be subject to limitations: these are permitted by implication, since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 33, ECHR 2001-XI (extracts), § 33; and *Cudak v. Lithuania* [GC], no. 15869/02, § 55, ECHR 2010).

56. Moreover, the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum (see *Fogarty*, cited above, § 35). The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity (see *Fogarty*, cited above, § 35; *Cudak*, cited above, § 56; *Sabeh El Leil v. France* [GC], no. 34869/05, § 48, 29 June 2011, and *Wallishauser v. Austria*, no. 156/04, § 59, 17 July 2012).

57. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. As the right of access to court is an inherent part of the fair trial guarantee in that Article, some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 56, ECHR 2001-XI; *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X; *Fogarty*, cited above, § 36; *Cudak*, cited above, § 57; and *Sabeh El Leil*, cited above, § 49).

58. Furthermore, it should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, *Reports* 1998-VIII). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

59. Therefore, in cases where the application of the rule of State immunity from jurisdiction restricts the exercise of the right of access to court, the Court must ascertain whether the circumstances of the case justified such a restriction.

60. The Court further reiterates that such a limitation must pursue a legitimate aim and that State immunity was developed in international law out of the principle *par in parem non habet imperium*, by virtue of which one State could not be subject to the jurisdiction of another (see *Al-Adsani*, cited above, § 54; *Cudak*, cited above, § 60; *Sabeh El Leil*, cited above, § 52, and *Wallishauser v. Austria*, cited above, § 60). It has taken the view that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty (*ibid*.).

61. In addition, the impugned restriction must also be proportionate to the aim pursued. In this connection, the Court observes that the application of absolute State immunity has, for many years, clearly been eroded, in particular with the adoption of the Convention on Jurisdictional Immunities of States and their Property by the United Nations General Assembly in

2004 (see *Cudak*, cited above, § 64, and *Sabeh El Leil*, cited above, § 53). This convention is based on Draft Articles adopted in 1991, of which Article 10 concerned commercial transactions and endorsed the principle of restrictive immunity, having provided that a State cannot rely upon immunity from jurisdiction if it engages in a commercial transaction with a foreign natural or juridical person (see paragraph 42 above).

(b) Application of these principles to the present case

62. The Court observes that in the present case the applicant brought a claim against the DPRK before the Russian courts of general jurisdiction, seeking repayment of a debt with interest on the basis of a receipt of 19 May 1997 signed by the DPRK Trade Counsellor to the effect that the Khabarovsk Office of the Trade Counsellor of the DPRK Embassy had borrowed a certain amount from the applicant.

63. By a final decision of 16 March 2004 the Khabarovsk Regional Court left the applicant's claim without examination, having applied Article 401 of the 2002 Code of Civil Procedure which provides for the absolute immunity of a foreign State before the Russian courts.

64. The Court must first examine whether the limitation pursued a legitimate aim. Having regard to paragraph 60 above, the Court considers that the grant of immunity to a State in the present case pursued the legitimate aim of complying with international law in order to promote comity and good relations between States through the respect of another State's sovereignty (see *Cudak*, cited above, § 60, and *Sabeh El Leil*, cited above, § 52).

65. It should therefore now be examined whether the impugned restriction on the applicant's right of access to court was proportionate to the aim pursued.

66. As the Court has found in previous cases, the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, apply under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (see *Cudak*, cited above, §§ 66-67; *Sabeh El Leil*, cited above, § 54, and *Wallishauser v. Austria*, cited above, § 60). For its part, Russia has not ratified it but has not opposed it: on the contrary, it signed the convention on 1 December 2006.

67. Moreover, even prior to Russia's signing the convention, it appears that it accepted restrictive immunity as a principle of customary international law. In particular, the President of Russia on two occasions, in the Opinion of 13 May 1998 and the Letter of 23 June 1999, clearly stated that restrictive immunity constituted a customary norm of international law, whereas the principle of absolute immunity was obsolete. In addition, the two highest judicial authorities, the Constitutional Court and the Supreme Commercial Court, also pronounced on the issue of State immunity.

Whereas in the ruling of 2 November 2000 the Constitutional Court stated that a formalistic application of Article 435(1) of the Code of Civil Procedure 1964 would lead to an inadmissible limitation of the right to judicial defence and instructed the courts to investigate the possibility of there having been an implied waiver of immunity by the foreign State, in the Information Letter of 18 January 2001 the Supreme Commercial Court unequivocally instructed the lower courts to apply restrictive immunity, despite absolute immunity being the rule under the 1995 Code of Commercial Procedure then in force. Furthermore, Article 251 of the new Code of Commercial Procedure adopted in 2002 provided for restrictive immunity to be applied in proceedings before the commercial courts.

68. Consequently, it is possible to affirm that the provisions of the International Law Commission's 1991 Draft Articles and the 2004 Convention apply to the respondent State, under customary international law (see *Cudak*, cited above, § 67, and *Sabeh El Leil*, cited above, § 58), and the Court must take this into consideration in examining whether the right of access to court, within the meaning of Article 6 § 1, was respected (*ibid.*). The same holds true for the Basle Convention, especially in view of the President's stance expressed in the Opinion (see paragraph 31 above).

69. The Court observes that in the case at hand the Khabarovsk Regional Court, in the final instance, returned the applicant's claim against the DPRK on 16 March 2004 without examination, having applied the blanket bar on claims against foreign States provided in Article 401 of the 2002 Code of Civil Procedure. The Regional Court noted, in particular, that a "person may only lodge a claim against a foreign State upon the prior consent of the State".

70. The domestic courts did not undertake any analysis of the nature of the transaction underlying the claim. They thus made no effort to establish whether the claim related to acts of the DPRK performed in the exercise of its sovereign authority or as a party to a transaction of a private law nature. Moreover, although the Khabarovsk Regional Court referred to the Annex to the Treaty on Trade and Navigation between the USSR and the DPRK of 22 June 1960 which governed the legal status of the DPRK Trade Representation, it confined itself to making reference to Article 2 of the Annex, stating that the Trade Representation was an organ of the State (the DPRK) acting in its name. However, the court did not take into consideration Article 3 of the Annex, defining the responsibility of the State for transactions entered into by the Trade Representation, nor Article 4, which specifically deals with immunities of the Trade Representation. In particular, Article 4 subjects all disputes arising out of foreign trade transactions concluded or guaranteed by the Trade Representation within the territory of the State of sojourn to the jurisdiction of the latter's courts. Yet the domestic courts failed to take this provision into account or to consider whether the transaction underlying the claim fell within its scope.

71. Thus, the domestic courts refused to examine the applicant's claim, having applied absolute State immunity from jurisdiction without any analysis of the underlying transaction, the applicable provisions of the Annex to the Treaty on Trade and Navigation between the USSR and the DPRK of 22 June 1960 and the applicable principles of customary international law, which under Article 15 (4) of the Constitution form an integral part of the Russian legal system.

72. The Court therefore concludes that by rejecting the applicant's claim without examination of the essence of the dispute and without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the Russian courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicant's right of access to court.

73. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

74. The applicant complained that the Russian courts' refusal to examine his claim had also violated his rights guaranteed by Article 1 of Protocol No. 1, which reads as follows:

> "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."

75. In so far as the complaint is lodged against the Democratic People's Republic of Korea, the latter not being a party to the Convention, this part of the application is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

76. In so far as the complaint is lodged against the Russian Federation, the Court observes that Russia may not be held responsible for the alleged failure of the DPRK Trade Counsellor to honour his debt. Inasmuch as the complaint concerns the failure of the Russian courts to examine the applicant's claim, it has been examined under Article 6 of the Convention above. The Court finds no outstanding issues that would fall to be examined under Article 1 of Protocol No. 1.

77. Accordingly, this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

79. The applicant claimed USD 13,000,000,000 as penalty for non-payment of the debt. The applicant did not claim non-pecuniary damage.

80. The Government found the amount excessive and unreasonable and stated that it had no causal connection with the alleged violation of the Convention.

81. The Court first considers that, where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation (see *Cudak*, cited above, § 79, and *Sabeh El Leil*, cited above, § 72). The Court further notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it would be prepared to regard the applicant as having been deprived of a real opportunity (see *Colozza v. Italy*, 12 February 1985, § 38, Series A no. 89, and *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). However, the Court notes that the applicant made no claim for compensation of non-pecuniary damage. Accordingly, the Court makes no award under this head.

B. Costs and expenses

82. The applicant made no claim for costs and expenses. Accordingly, the Court makes no award under this head either.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 against the Russian Federation admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 of the Convention;

3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President