

## **David Williams - former Senior Counsel, Astellas Pharma Europe - biography**

David Williams was, until March 2007, Senior Counsel at Astellas Pharma Europe, the EMEA regional operations of a global pharmaceutical enterprise headquartered in Tokyo, Japan. His responsibilities included supporting the development and implementation of business strategy across a sub-region comprising approximately 50 countries in Central & Eastern Europe and the emerging markets of Middle East, Africa, Australasia and Latin America.

Prior to joining Astellas in January 2005, David held a number of in-house legal advisory roles at British American Tobacco, including Group Corporate & Regulatory Counsel and Group Treasury Counsel. He started his career as a mergers and acquisitions lawyer in a leading City of London law firm.

Between 1997 and 2003 David served as chairman of the Management Committee of a charity providing social services to underprivileged children and families in Northwest London.

He is an English-qualified lawyer, and is a graduate of the University of Durham, England.

## CV

*Andrey Yu Bushev* (41) holds an LLM (1988) and PhD degree -Candidate of Science (1997); he is a lecturer (dotzent) at the Commercial Law Department of the St. Petersburg State University (since 1996). For several years, he has combined his academic interest in law with a diverse commercial practice both in Russia and abroad. He is an expert in Commercial Law and Comparative Business Law. Dr Bushev's special interests are in the area of securities, corporate governance, the law governing investments, law & economics.

### Legal practice

He was associated with an international law firm in St. Petersburg (1993-1996), acted as a general counsel and corporate secretary for a large international corporation with substantial investments in Russia (1996-2002); was a team leader in the regional branch of the International Finance Corporation, member of the World Bank Group, project on corporate governance (2003-2005); and since 2005 he is a Senior Legal Counsel in the legal group of the International Paper Inc, JSC Svetogorsk (USA, Russia).

Furthermore, since 1999 he is an arbiter with the Commercial Arbitration Tribunal of the St. Petersburg Chamber of Commerce and Industry.

### Academic experience

Dr. Bushev is also presently engaged with the University of Leiden (the Netherlands) in doctoral research devoted to the subject of law and policy in the field of securities regulation in Russia and the CIS.

Many times Dr Bushev acted as a speaker in the international conferences: Uppsala University (Uppsala, 1999), St. Marry University, Summer School (Innsbruck, 2000); CEELI ABA (Macedonia, 2000), Leiden University (Leiden, 2002, 2003), Wirtschafts Universitat (Vienna, 2003); IFC Conference (Tbilisi, Georgia, 2004) and others. He was acting, as an expert in Russian and Comparative law, in numerous complex commercial disputes involving well-known Russian and Western Corporations.

Dr Bushev is an author of over 50 scientific publications on the Commercial Law, including 9 abroad. His recent publications with RCEEL include, as co-author (i) *The Theoretical Underpinnings of Commercial Law: A Russian View on Bankruptcy and Securities* (Volume 30, No.2-4, 2005); (ii) *On Striking the Balance of Shareholders Interests During the Consolidation of Shares* (Volume 31, No.3, 2006, 155-177) (iii) *Protection of Shareholders through the Regulations of the Securities Markets // Rilka Dragneva, ed. Investor Protection in the CIS: Legal Reform and Voluntary Harmonization - forthcoming.*

### Other information

Dr Bushev got his professional training on several legal and MBA courses, in particular (but not limited to) in the (i) international law firms - Alen&Overy (London, 1994) and Gide Loyrette Nouel (Paris, 1995), (ii) international corporations - Carlsberg A/S (Helsinki, 1996-2000; Copenhagen, 1999-2001) and others; (iii) Faculty of Law of the University of East Anglia (1999); (iv) IFC, The World Bank, and TESIS, EU - courses on corporate governance (2003-2005), as well as in others.

Denise Hamer is currently Director and Counsel, Citigroup Fixed Income, managing legal teams supporting sales and trading in Emerging Markets and Distressed Debt (including Emerging Markets Distressed Debt). Previous roles have included Managing Partner of the Arthur Andersen Russian Legal Practice, Managing Attorney of White & Case Tashkent and Counsel for Societe Generale covering Eastern Europe and Latin America. Representative projects have included the creation of a distressed debt portfolio acquisition fund in Poland, establishment of the first residential mortgage bank in Russia, and a US Eximbank financed aircraft sale leaseback in Uzbekistan. Other work includes sales and trading of Paris and London Club debt and CDO's and other derivative products in the emerging markets and introduction of ecommerce trading platforms in emerging markets.



**Silvia Sparfeld, M. A.**, German lawyer and tax advisor, is a partner of the international law firm NÖRR STIEFENHOFER LÜTZ. Besides her legal education, she studied Slavic languages.

She has about fifteen years of experience in cross-border transactions in Central and Eastern European Countries (Czech Republic, Russia, Slovak Republic, Poland and Hungary). In the early 90s, she worked permanently in Prague and advised international clients on their investments in the Czech Republic and the Slovak Republic. Today, she is one of NÖRR's partners in charge of Central and Eastern Europe with a strong focus on investments in Russia and the Czech Republic. Besides numerous M&A and Joint Venture projects in those countries, her track record includes the following transactions

- privatization projects
- establishing Czech banks
- restructuring a Russian retail group
- advice on Russian tendering procedure of the Russian government
- establishing a Czech real estate fund
- establishing a Slovak real estate fund
- tax structuring

She is the author of many publications regarding Czech and Russian law.

## **Session 402**

# **Tips & Traps in Negotiating Contracts in Eastern Europe**

## **402 – Tips & Traps in Negotiating Contracts in Eastern Europe**

**Pierre Bernard**, Secretary General, Elia Group

**Andrei Bushev**, Senior Legal Counsel, International Paper

**Denise Hamer**, Director & Counsel, Citigroup Global Markets

**Silvia Sparfeld**, Partner, Nörr Stiefenhofer Lutz

**David Williams**, former Senior Counsel, Astellas Pharma Europe

## **This session**

1. Defining ‘Eastern Europe’
2. Recent political and economic changes in the region – identifying risks
3. Doing business in Eastern Europe – selected aspects
4. Closing comments / general discussion

# Defining 'Eastern Europe'





# Defining 'Eastern Europe'

## Classification

- EU members
- WTO members
- Former USSR countries
- CIS members & Baltic States
- Other blocks
- Transition & Early Transition Countries

## Recent events in Eastern Europe

- 1990-91 - collapse of communism
- 1992-93 – Russian privatisation programme
- 1998-2000 – Russian political / economic crisis
- 2004 – accession to EU of 8 former communist countries (plus Malta and Cyprus)
- 2007 – accession to EU of Romania, Bulgaria

# Economic background in Eastern Europe

- “One factory political management”
  - heavy & light industry
  - country specialization
  - business ties v. competition
  - “red directors”
  - workforce specialization v. management skills

## Economic background in Eastern Europe

- Remoteness from economic centres
- Infrastructure & economical institutions
- Need for restructuring v. external investments
- Market-seeking v. resource seeking motives  
(small market, lack of natural resources in most countries)
- Privatization v. oligarchic state economy  
“administrative resource”

# **Economic background in Eastern Europe**

## Measurement & Comparison

- **The World Bank (WB)** “*Doing business*”
- **EBRD** “*Transition Report*”
- **IMF** “*FDI in Emerging Market Countries*”

# Doing business in Eastern Europe

1. Liberalisation of markets (Pierre)
2. Deal Structure, Negotiation and Implementation (Denise)
3. Difference in meanings and procedures (Sylvia)
4. Enforceability of judgements (Andrei)
5. Corporate governance (Pierre)
6. EU trade in medicines – the Eastern European angle (David)
7. Selecting external legal counsel (David)

# **Liberalization of Markets**

## **(Pierre Bernard)**

## Liberalization of Markets: Electricity Sector (1)

### In general

- New Competition Law: “LAW 135-FZ-Protection of Competition”
  - Merger control
    - Thresholds
    - Procedures
  - Antitrust Provisions
    - Anti-competitive agreements
    - Abuse of dominance
    - Anti-competitive by central and local government bodies  
(+ limits on state aid)
  - Enforcement mechanisms
    - ↳ FAS can impose sanctions



## Liberalization of Markets: Electricity Sector (2)

● 2002: government → vast reform

- More efficiency
- Development via Private Investment

4 Pillars:

- **(A) New legislation: Federal law on Electric Power industry**
- **(B) Institutional Reform (in stages)**
- **(C) Ownership structures reform**
- **(D) Regulation reform**

## Liberalization of Markets: Electricity Sector (3)

### (A) New legislation: Federal law on Electric Power industry

(March 2003)(2 Phases)

- Create infrastructure companies
- Transform organisation
- Tariffs settings
- Restrictions on activities
- Several decrees
- ! Non discriminatory access

- Rules for connection
- Price regulation for wholesale price (temporary)
- Disclosure of information

! Many implementation acts are pending

- Ex:
- contracts for “last resort” providers
  - contracts for use of grid systems (vs owners)
  - etc.

## Liberalization of Markets: Electricity Sector (4)

### (B) Institutional Reform (in stages)

→ Ensure competition in the market



Monopoly of RAO-UES

→ role of the state

→ Support

→ "Federal Grid Operator"

→ Central Dispatching Administration

→ Regulated TSO – ISO // Free market =  
objective with limits

→ Decentralisation property management

## Liberalization of Markets: Electricity Sector (5)

### (C) Ownership Structures Reform

- (foreign) private investments
  - state ↪ essential infrastructure (75%)
- generation  
sales and trading

### (D) Regulation reform

↪ exit:

- FEC (Federal Energy Commission)

↪ welcome:

- F.A.S.: competition
- F.T.S.: tariffs
- T.R.C: technical regulation and control
- (Regional authorities)

## Liberalization of Markets: Electricity Sector (6)

### Practical differences with EU:

- Same approach BUT big infrastructural differences
- Unbundling: state control on grid vs. private (?)
- Regulatory bodies: cascading system
- M&A: distinction between transmission (+ distribution) and generation
- National requirements: nuclear power plants
- X- border trade +interconnection: federal grid but long term contracts



Time is of the essence  
Will of the markets

# **Deal Structure, Negotiation and Implementation (Denise Hamer)**

## **Deal Structure, Negotiation and Implementation**

- Tax, Accounting and Legal
- Due Diligence
- Capacity, Authority and Enforceability
- Title and Security
- Labour
- Insolvency

# **Difference in meanings and procedures** **(Silvia Sparfeld)**



- **Different legal systems – different meanings**
  - **Different countries have different legal systems**
  - **Different meanings of the same words**  
(e.g. real property, capital reserve, partnership, shareholder loan, thin capitalization)
  - **Different meanings of the same procedures**
  - **Different meaning of registration in public registers**

## ● **Existence of unknown procedures**

- **Requirement of an expert evaluation of purchase price in special cases**
- **Prohibition of "double one-person participation" in companies**
- **Limitation of participation in companies**
- **Leaving of shareholders**

● **Non-existence of specific procedures**

- **Approval of board members' actions**
- **Redemption of shares**
- **Extension of termination periods for employees**
- **“Good-faith” principle does not exist in all countries**

## **Use of Translations**

- **Not all official translators have an education comparable to western translators**
- **In bilingual agreements the leading version should always be the version one is able to read and understand**
- **Translations have to be checked by professionals in order to avoid translation mistakes**
- **Even official translations of local laws should be checked very carefully – often such translations are not up-to-date**



● **“Guidelines for Negotiations”**

- **Don't believe you are better – you are not.**
- **Don't think you can trust everybody – you should not.**
- **Don't think your law is their law – they have their own law.**
- **Don't trust translations – use your own advisors.**
- **Don't underestimate your partners – they are better than you might expect.**
- **Be aware of cultural differences.**
- **Be aware of different meanings of the same words.**
- **Ask for the information you are looking for.**
- **Ask questions, even those you might consider needless.**
- **Make sure laws are used in their currently applicable version**

# **Enforceability of judgements**

## **(Andrei Bushev)**

## From general to specific

*In what countries enforcement works better?*

- Richer and more educated population
  - “development theory”
  
- Incentives of participants in dispute resolution
  - contingency fee, “loser pays”, etc.
  - “incentive theory”
  
- Quantity & complexity of legal steps
  - “procedural formalism theory”

## From general to specific

- Private mechanism

  - reputation
  - negotiation culture
  - trust v. law

- Governmental mechanism

  - courts: state v. private
  - bailiffs
  - regulations: formalism is greater in civil than in common law countries; higher formalism predicts lower enforceability



## Measurement & Comparison (WB): “ideal legal case”

- number of procedures from the moment the plaintiff files a lawsuit in court until the moment of payment,
- time in calendar days to resolve the dispute, and
- cost in court fees and attorney fees, where the use of attorneys is mandatory or common, expressed as a percentage of the debt value.

## Measurement & Comparison (WB): “ideal legal case”

Country	Procedures number	Days	Cost (% of debt)
USA	17	300	7,7
Indonesia	34	570	126,5
China	31	292	26,8
Germany	30	394	10,5
Russia	31	178	13,5
Moldova	37	310	16,2
Poland	41	980	10,0
Estonia	25	275	11,5

## Measurement & Comparison (WB): “ideal legal case”

### ● RUSSIA

Indicator	Russia	Region	OECD
Procedures (number)	31	31.5	22.2
Time (days)	178	408.8	351.2
Cost (% of debt)	13.5	15.0	11.2

## Measurement & Comparison (WB): “ideal legal case”

Filing period (days)	5
Judgment period (days)	93
Enforcement period (days)	80
Cost (% of debt)	13.5
Attorney cost (% of debt)	11.2
Court cost (% of debt)	2.2

## Issues & challenges

- It is not an ideal world
- Judges & bailiffs
  - independency: “telephone law”, “opened eyes Themis”, corruption
  - professionalism: new principles & law
- Lesser chance for arbitration awards
- Location: independency v. assets
- Use of protective measures technique; “off-shore courts”

## **Issues & challenges: response**

- Find out who is your partner: assets, litigation story
- Mind “administrative resource”
- Balance location costs: independency v. assets

# **Corporate Governance - Russia** **(Pierre Bernard)**

## CORPORATE GOVERNANCE: Definition and origin

- ORIGIN : USA 19<sup>th</sup> century (or even long before ...)
  - ↳ to correct « market deficiencies »
- 1992 : CADBURY REPORT : « Corporate Governance : the system by which companies are directed and controlled »



- Many other definitions, ex.: IFC (Russian Corporate Governance Project) : « *The structures and processes for the direction and control of companies* »
- Reaction on corporate scandals
- Different approaches :
  - « comply or explain »
  - Sarbanes – Oxley Act (SOX)
  - Soft Law ↔ Hard Law

- Objective : ? shareholders value  
vs  
stakeholder protection } **General interest**
- companies should pay attention to a framework that is economically, ethically and socially responsible and sustainable
- SCOPE : different areas, all sectors

## ● **Corporate governance in Russia (1)**

### ● Some recent facts and figures\*:

- S&P Transparency Index ( $\pm 90\%$  Ru stock market total cap)

→ transparency + disclosure information:

- companies: 53% (from 50%)
- banks: 48% (from 36%)

- Transparency Index 2006

- Top 13 Private companies 2006: 59%
- Top 13 State owned companies: 51%

\* Standard and Poor's 2007

## Corporate governance in Russia (2)

### Some recent facts and figures\*:

- Transparency International Corruption Perception Index\*\*

(Clean)	2006	2005	(Highly corrupt)
10	2.5	2.4	0

Country ranking 121/163 126/158

- Significant improvement but remains below international standards

\* Standard and Poor's 2007

\*\* Definition of the Index: "The abuse of public office for private gain" (source: S&P 2007)

## Corporate governance in Russia (3)

- 
- Highly concentrated ownership
- Significant role of government in vital large companies
- Questions on true independence (directors, some regulatory bodies, etc.)
- Weak internal control procedures
- Top 70 largest companies:  $\pm$  1/3 have audit committee dominated by external directors
- Best S&P scorers are also listed on NYSE

## Corporate governance in Russia (4)

### ● Main Legal framework:

- Law on Joint Stock Companies (new: 01/07/2006)
  - Large definition of insider trading (*people with access to inside information do not have the right to use the information for completing trades*)
  - Company structure
- Federal Law on the Securities Market
  - Codification of scattered texts
  - More power to FCSM (Federal Commission for the Securities Market)
  - Restrictions on insider trading
  - Regulation of public disclosure

## Corporate governance in Russia (5)

- Russian Corporate Governance CODE (FCSM - April 2002)
  - Modelled on OECD (Economic Cooperation and Development)
  - Voluntary best practice
- Minimum 3 Independent directors
- Regulations for shareholder meetings
- Dividend policy
- No use of insider information
- !!! Voluntary basis
- Companies may have their own CG Code

## Corporate governance in Russia (6)

### ● Some Thoughts:

- Pressure of globalization
- Quality third party information
- Impact of the nature of investment / sector
- Price for “good governance”
- Differences between large ↔ small companies
- Quality assistance ↪ business choice / decision



**EU trade in medicines – the Eastern European  
angle  
(David Williams)**

- Parallel trade in medicines in the EU – overview
- Specific arrangements re. accession of Eastern European states, May 2004
- Negotiation of contracts for supply of medicines – traps

## Parallel trade in medicines in the EU

- Pricing and reimbursement status
  - set by local health ministries / regulatory agencies
- Price disparities between Member States
  - “arbitrage” opportunities – i.e. buy in low price Member State, resell in high
  - significant erosion of manufacturer’s income

## Trade between EU Member States – general legal principles

- Free movement of goods and services within the EU
- Exhaustion of intellectual property rights
  - once owner of IP in a product (*eg. manufacturer*) has put his product on market in EU (*i.e. in any Member State*), he cannot stop product being resold anywhere else in EU

*viz. tension within EU Treaty between:*

- *Health matters – policies set at Member State level; and*
- *Trade matters – e.g. policy of free movt. of goods/services set at EU level*

## The EU Accession Treaty Derogation – the “EU8”, 2004

- Exception to general rule of exhaustion of IP rights in EEA
- Applicable in relation to the “EU8”
  - Czech Rep., Slovakia, Hungary, Poland, Slovenia, Latvia, Lithuania, Estonia
  - *(but not in relation to Cyprus, Malta)*
- Purpose:
  1. Respond to industry concerns re. impact of parallel trade in EU from East to West
  2. Ensure patient access to medicines in East European Member States
  3. Smooth transition to free movt. of goods across all EU Member States

## The EU Accession Treaty Derogation

- Key determining factor – availability of patent protection in Eastern Europe
  - Patent laws not introduced in Eastern European countries until mid 1990s; e.g. Poland – April 1993
- Owner of IP rights can block import of a product from “EU8” countries into other EEA countries IF:
  - IP owner has patent protection in destination EEA country  
AND
  - At time that IP owner obtained patent protection in destination EEA country, he could not have obtained equivalent patent protection in EU8 exporting country

## Accession Treaty Derogation – worked examples

### ● Product X:

- Patent granted in UK March 1993 (*i.e. before April 1993*)
- Patent protection was not available in Poland
- CAN block export of Product X from Poland to UK

### ● Product Y:

- Patent granted in UK June 1993 (*i.e. after April 1993*)
- Patent protection was available in Poland
- CANNOT block export of Product Y from Poland to UK

## **Other aspects of managing EU trade in medicines**

- **Relationship btw. manufacturer and wholesalers / distributors**
  - Quota systems for wholesalers
  - Refusal to supply wholesalers
  - Differential pricing to wholesalers
  - Restrictions on sales of products by distributors outside allocated Territory
  
- **Relationship btw. manufacturer and parallel traders**
  - Using IP rights (trademarks) to prevent repackaging and relabelling
  - Outside scope of this session



## Negotiating distribution and wholesaler contracts - traps

- **Article 81(1) EC Treaty - prohibition of agreements and practices which restrict competition**
  - BUT, unilateral behaviour by manufacturer generally accepted not to infringe
  - e.g. unilateral imposition of quotas to wholesalers, refusal to supply
- **Art 82 - prohibition on undertakings abusing a dominant position**
- **EU Commission Guidelines on Vertical Restraints**
  - Distribution agreements – restrictions on prohibition of “Active Sales” (vs “Passive Sales”)

# Selecting External Legal Counsel (David Williams)

## **The legal services landscape**

- international law firms
- local law firms / sole practitioners

## **Issues and challenges**

- ‘quality’ – responsiveness, commercial approach, language skills, etc.
- cost
- cost of legal advice as % of transaction value
- technical skills and expertise

## **Role of local management to select external advisers**

### **Mix-and-match**

- local / sole practitioner – ‘local’ matters – e.g. company law compliance; local employment issues
- International firm – larger transactions; strategic, time-critical projects; industry-specific matters

# Closing comments / general discussion