The Moscow Times
30 YEARS
INDEPENDENT NEWS FROM RUSSIA

Can Russian Depositors Get Their Money Out of the Cyprus Banking System?

By Andrey Goltsblat

April 02, 2013



The Legal Highlights section did not involve the reporting or the editorial staff of The Moscow Times.



Andrey Goltsblat
Managing partner of Goltsblat BLP*
the Russian practice of BLP

Measures proposed by the European Union and Cyprus to "bail-in" depositors with more than 100,000 euros in the Cyprus banking system, as part of an EU led bailout for Cyprus and its financial system, amount to expropriation. Expropriation is not an invention of the European Union or German Chancellor Angela Merkel; having long been extensively used around the world.

The precise details of the proposed measures, how they will affect Russian depositors in the Cyprus banking system, or their legal implementation mechanisms, cannot yet be accurately assessed. Russian citizens are believed to have deposits worth more than 20 billion euros in Cyprus banks. Russia has stated that it will determine its response to the Cypriot financial and economic crisis,once Cyprus has agreed and approved a set of measures with the European Union. Now that the measures have been adopted, Russia is considering an EU call to assist Cyprus. The Russian President has instructed the government to look at the possibility of restructuring $2.5 billion of Cyprus state debt.

Over the previous week, a number of significant injunctions have been reported to have been granted in Cyprus:

• A depositor secured an injunction banning the haircut on deposits without compensation; but it appears that the court banned the authorities from making any decision that reduced or wiped out the plaintiff's deposits without affording fair compensation.

• A second injunction banned the authorities from intervening on deposits before offsetting them against the plaintiff's obligations to the bank.

• The court decision followed another injunction issued by the Supreme Court halting the decision to wipe out all current shareholders; this decision had been secured by the Church of

Cyprus, which is a major shareholder in the Bank of Cyprus.

The Cypriot plans so far are known to be:

a) the seizure, and partial conversion into bank shares, of up to 40 percent of each deposit over 100,000 euros in Laiki Bank and the Bank of Cyprus;

b) a partial or complete ban on overseas transfers of funds from deposits in Cyprus banks and foreign banks in Cyprus;

The termination of deposit ownership rights and seizure of deposits might be classed as expropriation without compensation. It is essentially state confiscation of property. Such actions are surprising, with confiscation usually applied by court ruling as punishment for a crime or serious offense.

Conversion of deposits into shares seems to be expropriation with unjust compensation — essentially requisitioning; the lawful state seizure of property in an emergency, with owners being compensated. However, in this instance, the value of the compensation does not, so far, appear commensurate with the property seized.



Evgeny Danilov
Expert

The legality of the ban on deposit transfers depends on international treaties between Cyprus and the states of which depositors in Cyprus banks are citizens, EU law and Cyprus legislation.

Cyprus is a member of the European Union and has had a written Constitution since 1960. Article 23 of the Constitution of Cyprus says:

“1. Every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right.

8. Any movable or immovable property may be requisitioned by the Republic or by a Communal Chamber for the purposes of the educational, religious, charitable or sporting institutions, bodies or establishments within its competence and only where the owner and the person entitled to possession of such property belong to the respective Community, and only -

(d) upon the prompt payment in cash of a just and equitable compensation to be determined in case of disagreement by a civil court.

11. Any interested person shall have the right of recourse to the court in respect of or under any of the provisions of this Article, and such recourse shall act as a stay of proceedings for the compulsory acquisition; and in case of any restriction or limitation imposed under paragraph 3 of this Article, the court shall have power to order stay of any proceedings in respect thereof.

Any decision of the court under this paragraph shall be subject to appeal."

The Constitution of Cyprus requires respect for ownership rights. If the exercise of this right is restricted, any substantial reduction in property must be promptly reimbursed. Expropriation and requisitioning of any property are permitted in Cyprus on the basis of a general law on enforced expropriation and a special law on requisitioning, on condition of fair and reasonable advance cash reimbursement. Affected parties have the right to go to court regarding any relevant resolution, or its execution, petitioning for the suspension of the expropriation process.

Under Article 35 of the Cyprus Constitution, "The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part."

Article 32 of the Cyprus Constitution also adds, "Nothing in this Part contained shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law".

Russia (including as the successor to the USSR), is the home of a substantial number of depositors in the Cyprus banking system, and is linked with Cyprus by a number of international treaties, the following of which are of particular interest.

Article 1 of the 1984 Agreement between the Soviet Union and the Republic of Cyprus on legal assistance in civil and criminal cases (effective 26 March 1987) establishes that citizens of either nation, as well as legal entities located on the territory and incorporated under laws of either nation, enjoy, on the territory of the other, the same legal protection in relation to their personal and property rights as do citizens of that nation. They are entitled to appeal freely, on the same basis as citizens, under the legal system of that nation.

Also, in 1997, the Russian Federation and the Republic of Cyprus signed an Agreement on the encouragement and mutual protection of investment. It was to have come into effect after ratification by both parties.

This Agreement still has not come into effect. The Russian president rejected the law upon its

ratification in 2007, noting in writing that the Agreement restricted the execution of investments, and limited obligations of parties to reimburse losses, as well as the transfer of payment regimes for investors of both nations. Yet the Agreement should have applied from its effective date to all investments between Cyprus and Russia, and their nationals, from 1 January 1997.

Russia and Cyprus are also both parties to the 1969 Vienna Convention on the Law of Treaties. Article 18 of the Convention states that, states signing treaties on the condition of ratification (as with the 1997 Agreement between Russia and Cyprus on the encouragement and mutual protection of investment) must refrain from actions that would defeat the object and purpose of such treaties, until a state clearly demonstrates an intention not to be party to the agreement. Good faith conduct by a state presumes that, during this period, it will refrain from any actions hampering or precluding fulfillment of an agreement after ratification. This requirement is a legal obligation for both Cyprus and Russia in relation to the 1997 Agreement on the encouragement and mutual protection of investment, unaffected by the 16 years since its signing.

Under this Agreement, investors are any citizen of, or any legal entity incorporated in, either nation. Investment, under this Agreement, includes all types of asset invested by a citizen from one nation on the territory of the other, expressly including monetary funds and deposits. Finally, however, Clause 2, Article 10 of this Agreement, also clearly says it "does not apply to the banking and finance sector".

The Agreement applies to all investments made by investors of the signatory nations on the territory of these nations from 1 January 1987; guaranteeing them fully and unconditionally, with legal protection under the legislation of either nation.

The Agreement envisages possible circumstances where investments made by investors of one nation are subject to expropriation, nationalization or equivalent measures. In particular, it says that they must be accompanied by prompt, appropriate and effective compensation, reflecting the market value of expropriated investments.

The Agreement also guarantees unhindered overseas transfer of payments connected with investments (after payment of taxes and levies) and does not envisage any withdrawal of this right. However, again, it should be noted that the Agreement does not apply to "to the banking and finance sector".

Under the Agreement, disputes between investors of one nation and the other nation are referred, at investor discretion, for consideration by a judicial body of the nation where the investment is made, or an arbitration institution.

Under international law (primarily the Vienna Convention of 1969), therefore, Russia does have certain grounds for demanding that Cyprus refrain from seizing or converting part of the deposits of Russian citizens in Cyprus banks, since such actions might defeat the object and purpose of the 1997 Agreement on encouragement and mutual protection of investment. These grounds, however, may well be considerably weakened by the 16 years both parties have subsequently failed to ratify the Agreement.

Russian nationals affected by the proposed 'bail-in' of depositors in the Cyprus banking

system may also refer to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

According to Clause 1, Article 6 of the Convention, to which both Russia and Cyprus are party, "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Article 14 of the Convention establishes that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground", including property status. This article could be significant given that the Cyprus financial system bailout overtly discriminates between Cyprus bank depositors with more or less than 100,000 euros.

On the basis of the Convention, any state party to the Convention may raise before the European Court of Human Rights any supposed violation of the provisions of the Convention and its Protocols by another Party.

The Court accepts appeals from any individual, any non-government organisation or any group where rights, recognised by the Convention and its Protocols, have been violated. The Court may consider a case only after all internal legal remedies envisaged by the generally accepted rules of international law have been exhausted, within six months of the national authorities issuing a final decision.

Article 41 of the Convention is particularly relevant to the application of crisis measures, stating: "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." States party to the Convention undertake to fulfil the final resolutions of the Court on any case in which they are involved.

This means that under certain circumstances, it is possible to use the provisions of the Convention for protection, on an individual basis, of the rights of Russian depositors in Cyprus banks in connection with crisis measures introduced in Cyprus.

For this purpose, however, each applicant must individually exhaust all internal legal remedies available in Cyprus and then prove to the European Court of Human Rights (ECtHR) that, in the dispute over their civil rights, Cyprus had violated that applicant's right to a fair public hearing within a reasonable time by a lawfully established independent and impartial tribunal.

After this, in the event of only partial remediation by Cyprus of any violation, there might be hope of fair compensation being awarded from Cyprus, to an applicant.

Of potentially major significance for protecting the rights of Russian depositors in Cyprus banks might be the practice of the ECtHR pertaining to disputes over civil rights and obligations and the award of fair compensation. This will require separate consideration.

* Goltsblat BLP is the Russian practice of Berwin Leighton Paisner (BLP), an award-winning

international law firm headquartered in London and with offices operating in major commercial and financial centres throughout the world — Moscow, Abu Dhabi, Beijing, Berlin, Brussels, Dubai, Frankfurt, Hong Kong, Paris and Singapore.
The firm has a team of 100 Russian, English and US law qualified lawyers based in Moscow and over 800 lawyers in the other international offices.
Goltsblat BLP clients include over 600 companies, about 70% of them being major multinationals operating in Russia, including 23 Fortune 500 clients.

www.gblplaw.com Tel: +7 (495) 287 44 44 e-mail: info@gblplaw.com

The Legal Highlights section did not involve the reporting or the editorial staff of The Moscow Times.

Original url:
https://www.themoscowtimes.com/2013/04/02/can-russian-depositors-get-their-money-out-of-the-cyprus-banking-system-a22878