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RUSSIA

Reorganization Procedure for Legal Entities Significantly Amended

At the end of 2008, the procedure for reorganizing Russian legal entities was changed through amendments to the applicable corporate and banking laws. Federal Law No. 315-FZ "On Amendments to the Law on Banks and Banking Activity and Some Other Legislative Acts of the Russian Federation", dated December 30, 2008, amended a number of laws: the Civil Code (First Part); Federal Law No. 17-FZ "On Banks and Banking Activity", dated February 3, 1996 (the "Banking Law"); Federal Law No. 208-FZ "On Joint-Stock Companies", dated December 26, 1995; and Federal Law No. 129-FZ "On State Registration of Legal Entities and Individual Entrepreneurs", dated August 8, 2001. The key changes in the new legislation are listed below.

- Within three business days of the date of a resolution to reorganize, a legal entity must provide information in writing to the agency responsible for the state registration of legal entities (i.e. the tax authorities) about commencing the reorganization procedure. On the basis of the notice, the agency responsible for the state registration of legal entities will make

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UKRAINE

Investors Provided Improved Opportunities to Rehabilitate Ukrainian Highways

As part of the preparations for Ukraine co-hosting the EURO 2012 football championships (together with Poland), the Ukrainian government has recently passed legislation that it hopes will entice investors to revamp parts of the country's road infrastructure, in particular out-of-town highways. On January 15, 2008 the Ukrainian parliament adopted the Law of Ukraine "On Concessions for Road Construction and Operation" (the "2009 Road Concession Law")¹ which became effective on January 31, 2009 and replaced a law with the same title adopted on December 14, 1999 by the Ukrainian Parliament (the "1999 Road Concession Law"). The 2009 Road Concession Law provides investors with certain assurances of financial and practical Ukrainian government support and guarantees as well as establishing a more structured and sophisticated legal framework for conducting concession activity.

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¹Amendments to other related laws were also adopted by the Ukrainian Parliament on January 15, 2009.

an entry in the state register of legal entities that the legal entity (legal entities) is/are in the process of reorganization.

- After the entry is made in the state register of legal entities noting the commencement of the reorganization procedure, the legal entity in reorganization must place two notices of its reorganization no less than one month apart in the mass media used to publish information on the state registration of legal entities.
- Any creditor of the legal entity -- if that creditor's claim predated the publication of the notice about the legal entity's reorganization -- is entitled to seek an early discharge of the reorganizing entity's obligation to it, or if an early discharge is not possible, termination of the obligation and compensation for the losses arising therefrom, except in certain cases established by law. If a creditor's claim predated the publication of a legal entity's reorganization announcement, and the legal entity is an open joint-stock company reorganized in a merger, acquisition or conversion (преобразование), then the creditor is entitled to file a claim in court for the early discharge of the obligation of the legal entity, or for termination of the obligation and compensation for the creditor's losses, unless sufficient security was provided by the reorganized open joint-stock company, or by its shareholders, or by third persons for the discharge of the relevant obligations.
- If claims for the early discharge or termination of obligations and compensation for losses are satisfied after the completion of the reorganization, the newly formed legal entities (or those continuing operations) bear joint and several liability for the obligations of the legal entity that was reorganized.
- If the obligations to the creditors of a debtor legal entity in reorganization are secured by a pledge or mortgage, such creditors are not entitled to claim additional security.

Note, however, that this procedure is not applicable to the reorganization of credit organizations (including banks) as the reorganization of credit organizations is governed by separate laws regulating the activities of credit organizations (in particular, the Banking Law). The Banking Law contains specific provisions on the reorganization of credit organizations. For example, a creditor of a credit organization is entitled to file a claim for the early discharge or termination of the credit organization's obligation to it

and compensation for losses if the claim was made by the legal entity pursuant to the terms of a contract concluded with the credit organization.¹ /V. *Andrianov*

¹ This is a major advantage for merged banks since contracts entered into by banks usually do not provide such right for a creditor. According to Kommersant, the amendments to the laws were one of the reasons why URSA-Bank and MDM-Bank changed the original pattern of their ongoing merger.

Fine Tuning the Russian Bankruptcy Law

In the February 11, 2009, edition of the *CIS Legal NewsWire*, we addressed the rights of a pledgee in bankruptcy under the amendments to the new bankruptcy law.

In this edition, we describe other changes aimed at improving the bankruptcy law in Russia. These amendments were introduced in the Bankruptcy Law on 30 December 2008 (the "Bankruptcy Amendments") and apply to all bankruptcy cases initiated after the amendments came into force.

1. New Definition of Current Payments and Rights of Creditors

Under the previous version of the Bankruptcy Law, the definition of "current payments" included payments (i) arising after bankruptcy proceedings were initiated or (ii) arising before a bankruptcy filing but falling due after bankruptcy proceedings were initiated. This definition allowed creditors to qualify payment obligations as "current payments" if they arose before bankruptcy but were payable after bankruptcy proceedings were initiated. Thus, these obligations were paid from the debtor's assets in priority over all other bankruptcy creditors. The Bankruptcy Amendments changed this definition to define "current payments" as only those that arise after bankruptcy proceedings are initiated (Article 5 of the Bankruptcy Law). Current payment claims are not included in the register of bankruptcy claims. Current payment claims are satisfied in the manner provided for in the Bankruptcy Law: they are generally paid in priority over all other bankruptcy claims (Section 1 of Article 134 of the Bankruptcy Law). Current payment creditors are not deemed to be parties to the bankruptcy case. However, these current creditors received certain procedural rights in

the Bankruptcy Amendments which improved their position in a bankruptcy case: for example, under Section 4 of Article 5 of the Bankruptcy Law, such creditors are entitled to challenge the acts of a bankruptcy manager in the arbitrazh court considering the bankruptcy case (the "Bankruptcy Court") if the bankruptcy manager's actions violate their rights and lawful interests. In such challenges, creditors owed current payments are entitled to obtain access to and copy the bankruptcy case materials (Section 3 of Article 35 of the Bankruptcy Law). In addition, while under external management, current payments are expressly excluded from a moratorium on the satisfaction of claims, and default interest will continue to accrue (Article 95 of the Bankruptcy Law). During receivership proceedings (a bankruptcy procedure taking place after the debtor is declared bankrupt), unlike regular bankruptcy claims, current payments continue to accrue default interest in the same manner as during the external management (Article 126 of the Bankruptcy Law). In the case of a creditor's claim that arose before a bankruptcy filing, but was not yet mature as of the date of implementation of the first bankruptcy procedure (supervisory procedure), under Section 1 of Article 4 of the Bankruptcy Law, these claims must be recognized for purposes of participation in the bankruptcy case, i.e. these claims now provide a creditor with the general rights accruing to a bankruptcy claim.

2. Amended Procedure for Establishing Creditors' Claims

The procedure for establishing creditors' claims for the first creditors' meeting (Article 71) was revised to clarify some of the timeframes: (i) a bankruptcy creditor is permitted to file a claim within 30 calendar days from the date of publication of the implementation of the debtor's supervision procedure; (ii) the debtor's objections to the bankruptcy claims can be brought before the Bankruptcy Court within 15 calendar days after the period for filing the bankruptcy claims expires. The revised Article 71 states that the Bankruptcy Court may order the bankruptcy manager to postpone the first creditors' meeting if not all of the bankruptcy claims filed within the prescribed period were adjudicated (properly filed bankruptcy claims must be adjudicated by a single bankruptcy judge within one month from the expiration date of the period for filing the debtor's objections to the bankruptcy claims). These revisions to Article 71 clarify the ambiguity in the rules for calculating these important procedural timeframes.

The procedure for establishing the amount of a bankruptcy claim filed during external management (see Article 100 of the Bankruptcy Law) was also revised. The primary amendment concerns the obligation of a bankruptcy manager to notify all registered creditors (whose bankruptcy claims are already included in the register of claims) of any newly filed bankruptcy claims and to provide existing creditors with notice of such new claims. A new bankruptcy creditor must compensate the bankruptcy manager for all costs associated with this notification. If the creditor does not compensate the bankruptcy manager, the bankruptcy court has the right to dismiss the new claims without adjudication.

Other provisions in the Bankruptcy Amendments require that during the receivership proceedings, interest on bankruptcy creditors' claims accrues at the rate established by the Bankruptcy Law (being the refinancing rate established by the Russian Central Bank on Ruble denominated claims; interest is to be calculated from the date the receivership proceedings are implemented until the date of satisfaction of the claims). The accrual of this interest, however, does not operate to generate the right to any additional votes at the creditors' meeting (Section 2.1 of Article 126).

3. New Interested Party Rules in Bankruptcy

The list of the debtor's interested parties (for the purposes of the bankruptcy proceedings) has been expanded to include the debtor's employees, executive officer, chief accountant, members of the debtor's board of directors and the executive board, including the persons who performed these functions for the past three years (versus one year in the previous edition of the law) before the initiation of bankruptcy proceedings. Please note that the same criteria apply to determine the interested parties of a bankruptcy manager and of a bankruptcy creditor. According to Section 3 of Article 103 of the Bankruptcy Law (not modified by the Bankruptcy Amendments), interested party transactions between an interested party and a debtor may be invalidated by the court at the request of a bankruptcy manager if such a transaction could cause damages to the debtor or its creditors. The Bankruptcy Amendments have specifically provided that "interested party transactions" of the receiver can only be concluded with the consent of the creditors' meeting or creditors' committee (See Section 2 of Article 129 of the Bankruptcy Law). Finally, the Bankruptcy Amendments require that when a bankruptcy manager

engages any auditor, independent appraiser and/or organizer of sales, the engaged party may not be an interested party in relation to the bankruptcy manager, the debtor or its creditors (Section 1 of Article 20.3 of the Bankruptcy Law). These rules are aimed at ensuring a fair bankruptcy of the debtor and avoiding any abuses on the part of various interested parties.

4. New Opportunity for a Debtor's Founder(s) or Third Party to Help the Debtor

The Bankruptcy Amendments allow a debtor's founder(s) or any third party to pay the debtor's indebtedness to the state budget (only if paid in full) and, thus, step in as a debtor's bankruptcy creditor in the amount of the debt paid. This opportunity is open at various stages of bankruptcy (during financial recovery - Article 85.1 of the Bankruptcy Law; during external management - Article 112.1 of the Bankruptcy Law; during the receivership proceedings - Article 129.1 of the Bankruptcy Law). It remains to be seen whether this possibility will become popular in practice in bankruptcy cases.

5. New Rights and Obligations of a Bankruptcy Manager

Among the new rights and obligations of a bankruptcy manager imposed by the Bankruptcy Amendments, of particular importance are (i) the obligation of a bankruptcy manager to report any signs of an administrative or criminal offense to the authorities (Section 2 of Article 20.3 of the Bankruptcy Law); (ii) the right to request information on the debtor's property and obligations from individuals, legal entities, and state or municipal bodies (Section 1 of Article 20.3 of the Bankruptcy Law); the enforcement of this right is supported by a corresponding obligation of the parties receiving a request to provide the documents or information to the bankruptcy manager within seven days on a free (unremunerated) basis (Section 2 of Article 66 of the Bankruptcy Law).

6. Use of the Internet for Publications in Bankruptcy

Article 28 of the Bankruptcy Law, as amended by the Bankruptcy Amendments, provides for an Internet version of the Unified Federal Register of Bankruptcy Information (containing major information on any particular bankruptcy case, including information on a particular bankruptcy proceeding for a particular debtor). Although clarifying normative acts have not yet been adopted, once they are in

place, major information on any particular bankruptcy case in Russia should be available on the Internet.

7. New Rules for Bankruptcy Costs

The Bankruptcy Amendments have imposed stricter rules on the payment of bankruptcy costs: (i) it is now an express statutory obligation of a bankruptcy manager to keep costs reasonable (Section 2 of Article 20.3); and (ii) two new articles were introduced to establish set fees for a bankruptcy manager (Article 20.6) and rules to determine the amount of fees allowed for outsourced specialists in bankruptcy proceedings; payment in excess of the predetermined amounts may only be made with permission of the bankruptcy court (Article 20.7). In practice, these amendments should result in more controlled spending of the costs during the bankruptcy but create difficulty in financing the costs, if the value exceeds the statutory limits.

8. Particular Procedural Issues Clarified

Under the Bankruptcy Amendments, (i) a creditor may apply with a petition to declare a debtor bankrupt after a court judgment substantiating the creditor's claims (or after enforcement of the arbitral award) becomes effective (with no need to apply to the court marshal and wait for 30 days as previously was the case; Article 7 of the Bankruptcy Law); (ii) the creditor's claims will generally be adjudicated within one month (Section 8 of Article 71 of the Bankruptcy Law, Section 8 of Article 100 of the Bankruptcy Law); (iii) a party who is not notified of the creditors' meeting may challenge the results but no later than six months from the date the decisions at such creditors' meeting are adopted; and (iv) the initial period during which receivership proceedings could be introduced was cut from one year to six months (although the provision that this term could be further extended for another six months remains unchanged).

Finally, it is now expressly provided that a challenge to a court's ruling on completion of the receivership proceedings will suspend the execution of such ruling. In the past, the absence of this provision made challenges to the ruling on completion of the receivership proceedings almost pointless since by the time the challenge was considered, the debtor had usually already been liquidated (the record on the debtor's liquidation was already filed with the Unified State Register of Legal Entities). */J. Romanova*

Court Rules in Favor of Taxpayer in Landmark Decision on Unjustified Tax Benefits

The Presidium of the Higher Arbitration Court of the Russian Federation recently passed Resolution No 7419/07, dated November 11, 2008 (the "Resolution") which provides some guidance on what were previously unclear issues surrounding so-called unjustified tax benefits. The Resolution, decided in favor of a taxpayer, should have a persuasive effect on judges in similar tax cases.

Facts

OOO "Transmark" (the "Taxpayer"), a Russian trading company affiliated with major beer producer SABMiller, entered into trademark license agreements with a foreign owner of trademarks. The Taxpayer also entered into certain trademark sublicense agreements with a Russian beer manufacturer (the "Manufacturer"). The license fees under the license agreements exceeded the fees under the sublicense agreements. In addition, the sublicense agreements, as well as supply agreements entered into between the Taxpayer and the Manufacturer, required the Manufacturer to sell all goods it produced through the Taxpayer. The Taxpayer and the Manufacturer were owned by the same shareholder. The Russian tax authorities claimed that the Taxpayer obtained an unjustified tax benefit (as the license fee that was paid out was greater than the incoming sublicense fee, which generated a loss and thus the off-set related value-added tax was unjustified).

Major Issues Discussed

The first issue discussed was whether the Taxpayer as a trading company may conclude a license agreement and pay royalties, in view of the fact that the trading company did not produce commodities, and thus, the trading company's business reason for such transaction is questionable.¹

The second issue posed was whether the fact that the outgoing license fee is below the incoming sublicense fee,

¹ In fact, this issue was very important since many Russian business holdings have been structured by using a foreign license company that accumulates royalties paid by Russian licensees.

which generates a loss, may lead to a conclusion that the Taxpayer obtained an unjustified tax benefit.

Decision

The Resolution resolved the issues in favor of the Taxpayer. The claim of the Taxpayer to offset VAT was upheld based on the following.

- (1) The transactions had sound business goals and were recorded in accordance with their actual economic meaning. A tax benefit cannot be recognized as unjustified if the taxpayer received it in connection with performing real business or some other kind of economic activity. Trading business activity itself does not preclude the possibility of concluding license and sublicense agreements.
- (2) Overall, the Taxpayer's activity included not only receiving an incoming sublicense fee and paying for an outgoing license fee but also included selling commodities produced by the Manufacturer. As such, the Taxpayer's activity taken as a whole was profitable, and the Taxpayer paid income tax.
- (3) The license agreements and the sublicense agreements were actually performed. There were no indications of sham transactions.
- (4) The Manufacturer (the counterparty under the sublicense agreements) did not breach its tax obligations and paid all applicable taxes.

Taken together, these elements supported the finding that the Taxpayer did not obtain an unjustified tax benefit, a decision which will be helpful for a very common business structure in Russia. *IV. Andrianov*

Major Amendments to Russian Anti-Corruption Laws Introduced

The end of 2008 saw major amendments to Russian anti-corruption laws with a new law and important changes to existing laws. In particular, Russian Federation Federal Law No. 273-FZ "On Combating Corruption", dated December 25, 2008 ("Law on Combating Corruption") was passed, and a number of substantial laws were amended, the most important of which were the Civil Code (Second Part) No.

14-FZ, dated January 26, 1996 (the "Civil Code"); the Criminal Code No. 63-FZ, dated June 13, 1996 (the "Criminal Code"); the Code on Administrative Offences No. 195-FZ, dated December 30, 2001 (the "Administrative Code"); the Labor Code No. 197-FZ, dated December 30, 2001; Federal Law of the Russian Federation No. 79-FZ "On the State Civil Service of the Russian Federation", dated July 27, 2004 (the "State Civil Service Law"); and Federal Law No. 3-FZ "On the Status of a Member of the Federation Council and a Deputy of the State Duma of the Federal Assembly of the Russian Federation", dated May 8, 1994. This article summarizes the major amendments to the anti-corruption laws arising out of this new legislation.

Gifts and Other Benefits and Privileges

The threshold for permissible gifts to various government officials has been changed. Currently, Article 575 of the Civil Code prohibits gifts made to¹ (1) persons occupying State Positions of the Russian Federation; (2) persons occupying State Positions of a Constituent Entity of the Russian Federation; (3) persons occupying Municipal Positions; (4) State Servants; (5) Municipal Servants; and (6) Servants of the Central Bank of the Russian Federation, in connection with their official status or the fulfillment of their official duties, except

- (i) ordinary gifts of 3,000 Rubles or less in value, or
- (ii) gifts of more than 3,000 Rubles in value received during official events, business trips or other formal events. Such gifts are deemed federal property or the property of the applicable Russian regional administrative subdivision. The persons listed above must surrender any such gift and provide a written statement to the state agency where such person occupies his or her post.

Article 19.28 has been added to the Administrative Code. The Administrative Code prohibits gifts or benefits made to an "Official" or to a "Person Performing Managerial Functions".²

¹ Russian law does not define persons occupying State Positions of the Russian Federation, persons occupying State Positions of a Constituent Entity of the Russian Federation, persons occupying Municipal Positions, State Servants and Municipal Servants. The law does, however, contain lists of specific positions which fall within the various categories listed above. In order to determine whether a certain employee of a state agency falls under any of these categories, one would need to review all such lists.

² "Person Performing Managerial Functions" is defined in Article 201 of the Criminal Code as follows: 1) person who performs the functions of the sole executive body; 2) member of the board of directors or another collegial executive body; or 3) person who discharges organizational and regulatory or administrative and economic duties in such organizations on a permanent or

Both of these terms are defined in the Criminal Code, but are also used in the Administrative Code. Under Article 19.28 of the Administrative Code, a legal entity that unlawfully provides money, securities, property or services of material value,³ to an Official or a Person Performing Managerial Functions, whether on its own behalf or for the benefit of another legal entity, will be subject to administrative liability in the place where such gifts were provided in return for an action or omission of action that results in the legal entity's favor and is connected with the duties of such Official or Person Performing Managerial Functions. Breaching Article 19.28 will result in the property provided being confiscated and an administrative fine of up to three times the value of such property or services, but not less than 1,000,000 Rubles, being imposed. Article 19.28 imposes administrative liability regardless of the value of the property or services given to an Official or a Person Performing Managerial Functions.

Commercial Activity of State Servant and Municipal Servant

Commercial dealings with state officials are addressed in two laws – the State Civil Service Law and the Law on Combating Corruption. The State Civil Service Law prohibits State Civil Servants from engaging in entrepreneurial activity or participating in managerial bodies of commercial entities for pay.⁴

The State Civil Service Law does not, however, prohibit a State Civil Servant from being an owner of an interest in or stock in a commercial entity. However, under Article 17(2) of the State Civil Service Law, a State Civil Servant who owns an interest in a commercial entity from which that State Civil Servant receives profit must transfer that interest into "a trust management" (*доверительное управление*) if the ownership of that interest could lead to a conflict of interest. Under Article 11(6) of the Law on Combating Corruption, even stricter limits are imposed. Under this provision, a State Servant or a Municipal Servant who owns an interest in a commercial entity must transfer that interest into a trust management to prevent a conflict of interest. As a result, the Law on Combating Corruption

³ Russian law neither defines what "services of a material value" are nor provides thresholds of such "material value".

⁴ State Civil Servants may participate in managerial bodies of commercial entities if they are authorized by the relevant state authorities and represent the state as a shareholder (participant) in a commercial entity.

effectively requires that any interest in a commercial entity held by a State Servant or Municipal Servant be transferred into a trust management at the outset. Since the Law on Combating Corruption was adopted after the State Civil Service Law, the stricter limits imposed by the Law on Combating Corruption should apply.

Commercial Dealings with Former State Civil Servants

The State Civil Service Law provides that, after discharge from state civil service, no citizen who has been a State Civil Servant shall be entitled to:

- occupy posts and/or perform work pursuant to a civil law contract in organizations if certain functions of the state administration of these organizations were directly within the scope of his/her employment duties as a State Civil Servant, unless a special government committee grants consent. This prohibition is imposed for two years after the State Civil Servant's discharge from the state civil service. A former State Civil Servant's new employer must inform the state authorities where the former State Civil Servant worked that it has employed the former State Civil Servant; or
- disclose or use confidential information or service information which has come to his/her knowledge as a result of the performance of his/her service duties to further the interests of any organization or natural person.

Other Matters

Among other provisions, the Law on Combating Corruption introduced (i) an affirmative obligation on all State and Municipal Servants to report attempted bribery to their employer (i.e. the State), to the attorney general's office and to other state authorities; (ii) an affirmative (explicit) liability for legal entities, including foreign legal entities, for corrupt activities, including liability of individuals participating in concrete corrupt actions; (iii) an affirmative obligation of State and Municipal Servants to disclose information on his or her property and income, as well as the property and income of his or her spouse and underage children. *IV. Andrianov*

New Aircraft Registration Law Signed

On March 14, 2009, President Medvedev signed Federal Law No. 31-FZ On the State Registration of Rights to Aircraft and Transactions Therewith (the "Law on Aircraft Registration"), which takes legal effect 180 after the date of its official publication (i.e. on September 13, 2009). The Law on Aircraft Registration establishes a legal framework for the state registration of title and other rights to aircraft and related transactions and should eliminate the gaps in the current registration system for aircraft. The legal framework is similar to the one set out in the Law on Registration of Immovables.

Articles 131 and 164 of the RF Civil Code provide generally for the state registration of rights to immovables and transactions therewith. More detailed rules are set forth in Federal Law No. 122-FZ On the State Registration of Immovables and Transactions Therewith ("Law on Registration of Immovables"). However, Article 4 of the Law on Registration of Immovables specifically excluded aircraft, maritime and river vessels and space objects, hence the need for the new law.

The rules set forth in the Law on Aircraft Registration apply to the registration of the title and other rights to civil aircraft as well as state-owned air vessels (within the meaning given by the Russian Air Code) which are used for commercial purposes. The state registration of rights to aircraft is the only evidence of a registered right (including title), and it may only be challenged in court.

Transactions with aircraft are subject to state registration where the Civil Code requires such registration. Rights relating to (including encumbrances and restrictions) and transactions with aircraft must be registered in the Unified State Register of Rights to Aircraft (the "Register").

Any rights to aircraft which have arisen, and transactions with aircraft which have been concluded, prior to the date the Law on Aircraft Registration takes legal effect will be deemed legal and binding even if not registered according to the rules set forth in the Law on Aircraft Registration. These rights can, however, be registered if requested by an appropriate interested person.

The information in the Register on registered rights is publicly available and can be obtained by any interested person by written request within five days from the

receipt of such request. If access to information is denied, the denial can be challenged in court. Certain more specific information such as the contents of the documents on file with the Register or summarized data on the rights of a person to an aircraft will be provided to a limited number of individuals and state authorities including law enforcement bodies, antimonopoly authorities, courts, and tax authorities.

The registration procedure as set forth in the Law on Aircraft Registration can generally be described by the following steps:

- submission of the request for registration accompanied by the required documents including evidence of payment of the state duty where applicable;
- legal audit of the submitted documents;
- verification of whether the rights sought may breach any of those already registered in the Register rights; and
- entry in the Register and inscriptions on title documents where applicable.

The registration will generally be completed within one month after submission of the application and all necessary documents. In certain instances where registration is preceded by the proper actions of a notary public, for example where a purchase agreement is notarized, the notary public will be authorized to submit the application for registration.

The Law on Aircraft Registration thus adds to the registration system of immovables in the Russian Federation by filling some significant gaps which have existed for a number of years. /K. Osipov, A. Petrov

Another Attempt Made to Privatize Moscow's Historic Buildings

Many of Moscow's historic buildings are almost in ruins. The city of Moscow believes that these buildings would significantly benefit from privatization and could become profitable for investors after reconstruction or restoration because local rental rates remain relatively high in spite of

the financial crisis. To stimulate a new wave of privatizations and add funds to its coffers,¹ the city recently adopted the Law of the City of Moscow No. 66 "On Privatization of State Property of the City of Moscow", dated December 17, 2008 (the "New Privatization Law"). This article highlights the city's current privatization regime for historic buildings and comments on the changes the New Privatization Law brings to that regime.

Privatization of historic buildings began at the local level in Moscow with the Law of the City of Moscow No. 26 "On Protection and Usage of Immovable Historical and Cultural Monuments", dated July 14, 2000, and the Law of the City of Moscow No. 12 "On Privatization of State and Municipal Property of the City of Moscow", dated April 11, 2001 (the "Old Privatization Law"). The New Privatization Law replaces the Old Privatization Law of 2001 and modernizes what was regarded as an outdated approach to privatizations in Moscow. In addition, historic building privatization is governed by two existing federal laws.² Both federal laws permit the private ownership of historic buildings, subject to an obligation imposed on the owner to ensure their proper maintenance, preservation and usage.

Reforming the Legislative Landscape

The Old Privatization Law predated the two federal laws referred to above and contained a number of provisions that potentially conflicted with later federal legislation. Although these potential conflicts have existed for a number of years, the slow pace of historic building privatizations in Moscow allowed them to escape immediate administrative scrutiny and redress. With the pace of privatizations expected to increase, the New Privatization Law was adopted, in part, to reconcile these conflicts. In addition, the New Privatization Law regulates the privatization process in greater detail and expands the mandate of the Moscow authorities in relation to privatizations.

¹Based on an economic and financial report attached to the legislative bill that ultimately became the New Privatization Law (as defined above), the City of Moscow Government expects to receive an additional 6,300 million Rubles in 2009 and 5,000 million Rubles in 2010 for its budget as a result of the new privatization program.

²Federal Law No. 178-FZ "On Privatization of State and Municipal Property", dated December 21, 2001 (the "Federal Law On Privatization") and Federal Law No. 73-FZ "On Objects of Cultural Heritage (historic and cultural monuments) of the Peoples of the Russian Federation", dated June 25, 2002 (the "Federal Law on Objects of Cultural Heritage").

Buildings to be Privatized

Under the Old Privatization Law, the Moscow City Duma had the authority to annually approve the building inventory available for privatization based on a list prepared by the real property department (*DIGM*) of the city government.

Under the New Privatization Law, the authority of the Moscow Government has been enlarged to allow it to both develop and approve the program for and inventory of buildings available for privatization in Moscow for three year cycles by no later than July 1 of the year preceding the start of each cycle. Thus, Moscow's first privatization program for 2010-2012 under the New Privatization Law is required to be announced no later than July 1, 2009. The New Privatization Law leaves the City Duma out of the privatization process. The exclusive involvement of the City Government in privatizations without oversight from any other administrative or legislative agency or body raises concerns about the soundness of the re-conceptualized privatization process.

Renovation and Preservation Obligations

Under the New Privatization Law, privatization agreements between the Moscow city government and investors must contain a provision obligating the investor to reconstruct and preserve the historic building. This obligation must be reflected in a detailed preservation order (*okhranno-obyazatelstvo*) that is required to be approved by the City's cultural heritage committee (*Moskomnasledie*).

The New Privatization Law also calls for historic buildings to be acquired by a single investor in order to make it easier for the City to impose obligations on that investor to preserve the architectural and cultural integrity of the structure, regardless of the number of tenants and users the building had prior to its privatization.

Buildings Exempt from Privatization

Under the New Privatization Law, *Moskomnasledie* is assigned the task of preparing the list of historic buildings and monuments to be privatized. However, in accordance with Article 9 of the New Privatization Law, this list may only be prepared after the Moscow City Duma issues a list of historical buildings and other cultural monuments that may not be privatized. The list of Moscow buildings and monuments not subject to privatization has not yet been

published.³ Consequently, the privatization process in Moscow may experience some delay. Media reports indicate that a complete inventory of all of Moscow's historical buildings and other cultural monuments is expected to be completed in 2009.

Historic Buildings under Exclusive Federal Control

In addition to the list of Moscow buildings and other monuments exempt from privatization, a number of other historic buildings located in Moscow and elsewhere may be subject to exclusive federal regulation in regard to their privatization. According to Item 2 of Article 63 of the Federal Law on Objects of Cultural Heritage, the federal government must approve the lists of cultural heritage objects that must be retained (owned) by the federal government in order for the subjects (administrative subdivisions) of the Russian Federation and municipal authorities to perform their statutory obligations. This list of historic buildings and cultural monuments of federal significance has not yet been approved for the city of Moscow. By contrast, on May 6, 2008, the federal government promulgated Regulation No. 651-p "On Approval of the Lists of Objects of Cultural Heritage Located in the City of St. Petersburg that are Contemplated to be Owned by the Russian Federation and by the City of St. Petersburg".

Further Proposed Legislation

On January 19, 2009, further legislation relating to historic buildings was introduced in the Moscow City Duma in the form of a bill entitled "On the Historical and Cultural Monuments of Moscow". The first hearing on this bill took place in February 2009. The bill describes the general status of objects of cultural heritage in the City of Moscow, the powers of the city authorities relating to their protection, preservation and usage and various mechanisms for their protection by the state and private investors.

Conclusion

Re-initiation of the privatization process for historic

³Article 9 (14) of the Federal Law on Objects of Cultural Heritage provides that federal executive authorities must prepare a list of objects of cultural heritage owned by the federal government that are not subject to privatization. This list has also not yet been published.

buildings in Moscow reflects a city in need of funding and anxious to save its cultural heritage. The declining value of the Ruble could spur significant investor interest in these unique properties. Since the city itself has acknowledged that it lacks the funds to restore and maintain all of its historic buildings, a renewed attempt at privatizing them seems a reasonable and efficient answer. */l. Skidan, A. Yatsko*

Barter Revisited

German Sterligov, who created Russia's first commodity exchange in 1989 (which subsequently went bankrupt), is revisiting barter as a possible means to support markets in goods and commodities, while simultaneously addressing the lack of available financial resources, including credit, that is symptomatic of today's global financial crisis. Barter was last widely used in Russia during the country's currency crisis in the late 1990s. This article summarizes Mr. Sterligov's barter scheme and identifies a few key legal and commercial issues raised by it.

Global Barter Network

Mr. Sterligov recently started creating a global network to act as an information broker regarding chains of proposed barter transactions in goods and commodities that are not dependent on the transfer of cash in order for each segment of the chain to be completed. For this purpose he has formed a Russian open joint stock company, OAO "Anti-crisis Commodities Clearing Center" (*OAO "Antikrisisnyi Raschetno-tovarnyi Tsentr"*) (the "Clearing Center"), that, in turn, owns subsidiary clearing centers in 23 cities in Russia (among them, Moscow, St. Petersburg, Krasnodar, Kazan, Novosibirsk and Chelyabinsk), as well as several outside of Russia (Astana, Kyiv, London, Beijing and Hong Kong).

The network operates by means of a computer program that generates a continuously updated database relaying available supply and demand information for specific goods and commodities provided by clients of the Clearing Center. In addition to identifying prospective buyers and sellers for these products, the database transmits their bid and offer prices and indicates whether they are willing to accept an in-kind exchange or require cash settlement. Based on the information contained in the database, the program automatically matches possible chains of barter and sends the resulting information to the Clearing Center's clients.

Typical Barter Chain Structure

An entity enters into a barter chain by inputting information into the computer database either offering to sell or to buy a specific product for a specified amount of cash or offering to acquire one specific product in exchange for another specific product. Any goods, commodities or cash entered into the system are considered to have been committed by the Clearing Center's clients for the purpose of creating alternative barter chains of transactions.

The computer program periodically creates a chain out of these independently supplied pieces of information by matching prospective sellers and buyers so that at the beginning of each chain there is a party willing to receive a cash payment for supplying a specific product or commodity and at the end of the chain there is a party willing to pay cash for, most likely, a completely different product or commodity. In the middle of the barter chain there is, conceivably, a substantial number of prospective sellers and buyers that exchange various available goods and commodities on a non-cash basis and in a manner such that all demands are satisfied upon the completion of the integrated chain. The computer program is instrumental in establishing the order in which these various exchanges are required to take place in order for the barter chain to work effectively.

Key Legal and Commercial Issues Raised by the Barter Chain

Apart from its possible economic viability, the barter scheme presents a number of significant legal and commercial issues. Some of the key issues are considered below.

Pay-to-Play Deposit

The proposed model services agreement between the Clearing Center and each client desiring to use its database provides for a deposit, generally equal to 2% of the initial offer price for the good or commodity in which the client is interested, to be made to the Clearing Center. Upon completion of the barter chain, the deposit is returned to the client, less a fee for the Clearing Center's services. It is not clear what happens to the deposit if a proposed barter chain is not completed due to the parties' failure to reach an agreement or if a default in the chain occurs after an agreement has been reached but before the chain is fully performed.

Under Russian law, the deposit could be considered to be a non-interest bearing loan from the client to the Clearing Center. Article 809 of the Civil Code provides that in such circumstances, the client would be entitled to interest in an amount equal to the Central Bank's daily interest rate on the principal amount of the loan. Furthermore, Article 810 of the Civil Code provides that the Clearing Center is obligated to return the "loan" within 30 days of the client's demand.

When Does the Legal Obligation to Sell and Purchase Arise?

The Clearing Center operates as an information broker and not as a commodities exchange. Consequently, parties obtaining information regarding possible barter chains from the Clearing Center's database are not legally obligated to enter into the proposed transactions. Transactions become legally binding only when all of the parties to a barter chain enter into a sale and purchase agreement covering their arrangement.

Subject and Scope of the Sale and Purchase Agreement

All of the transactions in a sequential barter chain are necessarily interrelated and each successful barter chain effectively results in a single omnibus sale and purchase arrangement, with intermediate in-kind exchanges, involving at least three parties and two or more goods or commodities. A large number of parties significantly increases the risk that they may not reach agreement on the terms and conditions governing their barter.

A sale and purchase agreement of the type necessary to document the transactions comprising the barter chain would be considered very atypical under Russian law and not easily subject to regulation under the Civil Code. While it is possible under Russian law for a single sale and purchase agreement to cover a multitude of sellers or buyers of one or more objects, such an agreement typically governs a single transaction and not an integrated series of transactions, such as a barter chain. Furthermore, because of the structure of the barter chain, its segments cannot be analyzed independently of one another and the rights of a party vis-à-vis the other parties in the chain can be based on the completion of, or defaults in, segments of the chain in which it did not participate. For example, the right of the initial seller in the chain to receive a cash payment for the goods it transfers to the second seller in the chain may depend on the successful transfer of different goods by the third seller to the last purchaser in the chain, who then pays the cash to the first seller. If the last purchaser defaults, the first seller's rights arise as a result of a transaction in goods that it did not

provide and in which it did not participate. Consequently, the complexity created by these intersecting and overlapping rights of the parties raises the risk that the object of the agreement may not be identified with sufficient specificity for purposes of Russian law. If such a determination were to be made by a court, it would lead to the entire agreement being declared invalid under Russian law. The task of describing the objects of the sale and purchase agreement in a manner capable of surviving a claim of invalidity will present the greatest challenge for drafters of the sale and purchase agreement.

Documenting arrangements involving parties and commodities located in different jurisdictions appears to be particularly challenging, given competing legal regimes and the possibility of denominating payments in different currencies. Agreement on the allocation of the risk of fluctuating exchange rates among the participants in the barter chain would likely involve substantial negotiation. Consequently, the sale and purchase agreements with the best chance of being concluded and surviving a legal challenge are those that involve the fewest parties, all of whom are located in the same jurisdiction, and which relate to generic or non-differentiated goods or commodities that can be supplied locally.

Establishing the Price

The predominant feature of this barter arrangement is that it involves an integrated chain of transactions that is presumably designed to transfer equivalent economic value to the participants in each segment of the chain. Furthermore, the integrated nature of the chain makes its overall value greater than the sum of its individual parts, because without the chain its component transactions would not be completed.

The price established for each segment in the chain must account for any VAT that may be due on the sale or barter of the goods or commodities. In addition, barter belongs to that class of transactions whose price may be reviewed and recalculated by the Russian tax authorities for any segment of the chain that falls within their jurisdiction if they are able to determine that the price has not been properly established. Alteration of the purchase and sale price in any segment could disrupt the entire barter chain and threaten its economic viability.

Within the Clearing Center's global network, barter chains are constructed on the basis of information contained in its computer database, presumably based on market prices, as

provided by the Clearing Center's clients. However, the database price information may be out of date with respect to some or all of the goods or commodities in the barter chain by the time the parties negotiate a sale and purchase agreement. This can potentially disrupt the entire chain, even though under Russian law there is a presumption that objects exchanged in a barter transaction have equivalent value. Furthermore, in addition to fluctuations in market price, there may be fluctuations in currency exchange rates if the prices for goods or commodities are denominated in different currencies.

Consequence of Default in the Barter Chain and Available Remedies

If one of the parties in the barter chain fails to perform its obligation to transfer goods or commodities to another party in the chain, the remedy provided under Russian law is termination of the agreement. Under Article 463 of the Civil Code, a party to a sale and purchase agreement is only entitled to demand specific performance of the agreement if the seller received an advance payment from the purchaser or if the goods covered by the agreement are specifically identified. Neither exception is applicable to the transactions contemplated by the barter chain. However, in all cases, including the case of barter, the non-defaulting party is entitled to claim damages resulting from the loss of the benefit of its bargain if it can prove them.

The parties may also wish to consider including a system of penalties in the sale and purchase agreement to strengthen the disincentive to default. The non-defaulting party in the segment where the default occurs, as well as parties further up and further down the barter chain, should be capable of exacting these penalties from the defaulting party, particularly if their segment of the chain can no longer be completed or if a previously completed segment involving non-defaulting parties becomes susceptible to being rescinded as a result of the default. It is important to note that monetary penalties or damages may not be a sufficient incentive to avoid defaults in a barter arrangement.

Risk of Non-Performance by Intermediaries

The chain of barter transactions could involve a highly sophisticated scheme for transporting and delivering the goods and commodities. In certain cases it may be possible for the parties to appoint a single transportation agent to be responsible for the entire chain of shipments and deliveries. The risk that an intermediary critical to the barter chain may

not perform its obligations needs to be assessed and apportioned among the parties.

Tax Implications

In accordance with the RF Tax Code, each segment of the barter chain results in a transfer of goods or commodities for value. Consequently, each party transferring goods or commodities is required to pay VAT (generally, at a tax rate of 18%) on the purchase price received from the transferee. This payment must be made in cash, even though it arises from a transaction in which no cash changed hands and only goods or commodities were transferred.

In addition, the profit received by the seller of the goods or commodities in each segment of the barter chain (generally equal to the difference between the cost of the goods transferred by the seller and the price paid by the seller for the goods received in exchange) will be included in the calculation of the seller's net income for tax purposes and may result in the seller paying an income tax in cash (generally, at a tax rate of 20%) even if no cash changed hands as a result of the barter transaction.

Conclusion

While Mr. Sterligov's proposals do not lack vision, in practice they raise a number of interesting but difficult legal and commercial issues. Finding ways to resolve them could lead prospective participants in a barter chain to conclude that their participation would not be efficient or cost-effective. The utility of Mr. Sterligov's global information network may improve if it is operated more like a true commodities exchange with participants subject to firm commitments to buy and sell goods or commodities based on the information entered into the database. In reality, local parties involved in simple transactions relating to generic goods are the ones most likely to successfully participate in the kind of barter chain envisioned by Mr. Sterligov, but even these transactions will not be without their challenges. */l. Skidan, A. Yatsko, A. Petrov*

UKRAINE

Investors Provided Improved Opportunities to Rehabilitate Ukrainian Highways

(Continued from page 1)

Arguably, the main benefit of the newly adopted legislation is that it significantly expands the variety of concession models available in Ukraine. The 2009 Road Concession Law now allows concessions to be granted for the construction, rehabilitation, overhaul and/or operation of a highway (e. BOT, BT, OT, BOMT, ROT)² whereas the 1999 Road Concession Law only envisaged the construction and operation (maintenance) of a highway (*i.e.*, only BOT).

The 2009 Road Concession Law enables concessions to be granted to rehabilitate highways of "general use" (intercity highways, highways between towns and cities and highways on international transport corridors).³ When deciding which highway concessions to offer for tender, the Cabinet of Ministers of Ukraine (the "CMU") is required to consider the social and economic effectiveness of each concession project in the context of the full approved list of highways of "general use" which may be constructed, rehabilitated and/or operated under concession arrangements in accordance with the Ukrainian State Program on the Development of Highways of "General Use".

Additionally, a concessionaire is now entitled to build road service facilities on land adjacent to a highway. The 2009 Road Concession Law introduces generally tighter specifications for the construction and/or operation of highways. Other major amendments are described below.

1. Government Support

The concession grantor (the CMU or the executive agency authorized by the CMU) may now finance or co-finance the construction and/or operation of a highway within the scope and procedure specified by the relevant concession agreement by using funds held in a special fund of the state budget for the development and maintenance of

²'BOT' means Build-Operate-Transfer; 'BT' means Build-Transfer; 'OT' means Operate-Transfer; 'BOMT' means Build-Operate Maintain-Transfer; 'ROT' means Rehabilitate-Operate-Transfer.

³The list of such highways is approved by the Cabinet of Ministers of Ukraine.

"general use" highways. Moreover, the concession grantor is obligated to assist a concessionaire in obtaining the necessary permits and licenses.

2. Concession Bid

First, the CMU must approve the procedure for conducting a concession tender; second, the State Service of Highways of Ukraine ("Ukravtodor") confirms the terms of the relevant concession bid on the basis of a feasibility study and/or design and estimate documentation. Under the 1999 Road Concession Law, the terms of each concession bid never stipulated that a feasibility study and/or design and estimate documentation needed to be submitted.

3. Concessionaire's Fees

In the operation of a highway, a concessionaire may benefit from the following revenue streams: (i) passage fees (tolls), paid by road users; (ii) a "road operational readiness fee",⁴ paid by the concession grantor; (iii) fees for using road service facilities, paid by road users; (iv) grants and/or compensation provided by a concession grantor; and (v) other sources specified by the concession grantor on the basis of a feasibility study and/or design and estimate documentation and specified in the relevant tender documentation and concession agreement. Under the 1999 Road Concession Law, a concessionaire was only entitled to receive income after having paid all applicable taxes and obligatory fees connected with the concession agreement that were required by Ukrainian law.

The 2009 Road Concession Law provides that the CMU will set the maximum and minimum amounts for the passage fees (tolls), the provision of grants, compensation and calculation of "road operational readiness fees".

Under the 2009 Road Concession Law, the concessionaire is only obliged to pay concession fees to the Ukrainian State once it has begun to receive income from operating the concession whereas under the 1999 Road Concession Law, it was obligated to pay such concession fees to the Ukrainian State before it began to receive any operating income.

4. Land Use and Property Rights

The concessionaire only has the right to build a highway after it has obtained the right to use the appropriate tracts of land for construction purposes. Additionally, a concession grantor is now obligated to ensure that each applicable tract

⁴A reimbursement by the concession grantor to a concessionaire for construction or rehabilitation expenses for a highway.

of land has been authorized to be developed for its proper designated purpose and to guarantee that there are neither limitations nor encumbrances in connection with the use of the land in accordance with the terms of the concession agreement.

Any fixture or other immovable property created during the construction process belongs to the Ukrainian state but is provided to the concessionaire for its possession and use during the term of the concession agreement.

5. Key Amendments to Other Related Laws

The Law of Ukraine "On Concessions", dated July 16, 1999 (the "Law on Concessions") was revised to clarify the terms of concession agreements in the following areas:

- allocation of responsibility for non-performance or improper performance of obligations arising from a concession agreement;
- procedure for amendment and termination of a concession agreement;
- right to obtain information and verify the fulfillment of provisions of a concession agreement;
- procedure and terms for a transfer by contractual assignment of rights and obligations (including providing lenders with a guarantee) arising from a concession agreement; and
- procedure for using intellectual property rights in connection with a concession agreement.

An amendment to the Law of Ukraine "On Automobile Roads", dated September 8, 2005, specifies that the State Agency for the Management of Highways ("Ukravtodor") is no longer the sole agency which may exercise the functions of a concession grantor.

Conclusion

The 2009 Road Concession Law provides investors with a legal framework to rehabilitate highways of "general use" in Ukraine and gives them greater flexibility in choosing an appropriate concession model when constructing and rehabilitating those highways. Investors now also have more certainty as to the parameters of the terms of concession agreements which may be agreed with the Ukrainian state.⁵ /J. Dakin, O. Soloviova

⁵ Currently, potential concession projects include the Kyiv Beltway, the Dnipro Tunnel, and the Odessa-Reni and Kharkiv-Shcherbakivka highways.

National Bank of Ukraine Acts to Help Ukrainian Banks Restructure Non-Performing Loans to Individuals

In order to help mitigate the negative impact of the financial crisis, on February 5, 2009, the National Bank of Ukraine (the "NBU") adopted Regulation No. 49 "On Certain Issues of Bank Activity" ("Regulation 49") which gives Ukrainian banks greater freedom to restructure their non-performing loans to individuals. Regulation 49 also provides a greater incentive to foreign banks to recapitalize their Ukrainian subsidiary banks by increasing the maximum interest rate on any subordinated debt facilities denominated in foreign currency that they may grant. The effect of Regulation 49 is to preserve Ukrainian banks' capital ratios, which would otherwise have to be reduced as a result of an increase in the need to set aside reserves against non-performing loans to individuals.

Restructuring of Individual Debts

The adoption of Regulation 49 has given Ukrainian banks the flexibility to restructure their non-performing loans to individuals. Previously, Ukrainian banks were prevented from restructuring their loans to individuals by virtue of NBU Regulation No. 279 "On the Procedure for Establishing and Using Bad Loan Provisions", dated July 6, 2000 ("Regulation 279"), which imposed rigid parameters on loan provisions. Any restructuring of loans to individuals carried out pursuant to Regulation 49 will not in itself create an event leading to a negative reclassification of that loan as would normally be required by Regulation 279 (any such reclassification would lead to an increase in the need to set aside reserves against non-performing loans by Ukrainian banks). According to Regulation 49, Ukrainian banks may now restructure their loans to individuals without increasing their need to set aside reserves against non-performing loans but only on the condition that either an amount of principal or interest/commitment fees (as agreed by the relevant Ukrainian bank and borrower) is duly paid by the borrower on at least a monthly basis.

Additionally, Ukrainian banks may now restructure their loans to individuals by extending the term of any loan agreement and thereby reducing monthly payments. Further, the NBU has recommended that any penalties on the borrower that may have applied under previous loan agreements should not apply to any restructured loans, provided that the borrower duly complies with the conditions of the restructured loan agreement. By way of example, we understand that Ukrainian banks are currently granting individual borrowers a six-month grace period during which time they are only obliged to make restructured payments of interest (and not principal) under their loan agreements.

Maximum Rate for Subordinated Debt

Regulation 49 has temporarily increased (until January 1, 2011) the maximum interest rate applicable to subordinated loans denominated in foreign currency issued to Ukrainian borrowers. The maximum applicable interest rate is now established at a 12-month LIBOR deposit rate plus 12% per annum. This new interest rate became effective on February 5, 2009 in respect of subordinated loan agreements executed on that date or thereafter.¹

Previously, the maximum applicable interest rate for foreign currency subordinated loans was fixed² at (1) the 12-month LIBOR deposit rate plus 5% per annum for loans denominated in US Dollars and (2) the 12-month LIBOR deposit rate plus 7% per annum for loans denominated in Euros. These changes in the interest rate are aimed at making lending by foreign banks to Ukrainian banks by way of subordinated debt issuances more attractive, which, in turn, may enable Ukrainian banks to increase their reserve capital. Also, any increase in reserve capital held by Ukrainian banks should give a boost to both foreign and Ukrainian investor confidence in the Ukrainian banking system. */J. Dakin, Y. Voytsitskyi, R. Shulyar*

¹ "On Resolution of the Board of the National Bank of Ukraine No.4, dated February 5, 2009"

² NBU Regulation No. 450 "On Maximum Interest Rate on Subordinated Loans," dated November 24, 2005.

Ukraine Tightens Immigration and Work Permit Procedures for Foreigners

At the beginning of 2009, the Ukrainian government tightened the procedures for the employment of foreigners by Ukrainian companies in Ukraine. These measures included the following:

- the duration of the stay of a foreigner in Ukraine is now recorded by a computerized system installed at border crossing points;
- compliance with visa legislation is now more rigorously enforced;
- an employer who hires a foreigner must now file additional documents with the Ukrainian employment authorities;
- an employer's liability for not obtaining a work permit for a foreign employee has increased; and
- the two exemptions from the requirement to hold a work permit have been abolished.

However, those foreigners who enter, or have entered, Ukraine on the basis of a private invitation, for the purposes of study or medical treatment, as tourists, diplomats or employees of representative offices, are unaffected by the recent procedural changes.

Oversight of the Duration of a Foreigner's Stay in Ukraine

In September 2008, the Ukrainian border control authorities launched a computerized system to calculate the number of days a foreigner spends in Ukraine and thereby detect those foreigners that have overstayed their permitted time in Ukraine: (i) visa-free foreigners¹ who have stayed more than 90 days within 180 consecutive days, (ii) visa-holding foreigners who have stayed more than 90 days in a single visit, or (iii) foreigners² from World

¹ The list of countries which have visa-free agreements with Ukraine is found in Annex 4 to the "Regulation of the Cabinet of Ministers of Ukraine on the Rules for Foreigners and Stateless Individuals Entering, Departing or Transiting through Ukraine" No. 1074 dated December 29, 1995, as amended.

² Regardless of whether they hold a business visa or not.

Trade Organization (WTO) countries who have stayed in Ukraine longer than 180 days in any one calendar year. When the system detected that foreigners had overstayed their permitted time in December 2008, a number of such individuals were reported to have been required to pay fines upon leaving Ukraine and/or faced exclusion from re-entering Ukraine for a year or even permanently. It has been a widespread practice that foreigners intending to be employed by Ukrainian companies have entered Ukraine without a visa, or simply on the basis of a business visa, and thereafter have obtained a work permit from the Ukrainian employment authorities³ giving them the legal right to work in Ukraine. However, Ukrainian law provides that if a foreigner is employed by a Ukrainian company, the foreigner must obtain an immigration visa *prior* to entering Ukraine and then register⁴ the visa with the Ukrainian immigration authorities⁵ after arrival. Since obtaining and registering a Ukrainian immigration visa can be a complicated, time-consuming and relatively expensive process, many Ukrainian companies have tried to avoid compliance, which was not especially difficult since Ukrainian law in this regard has not generally been enforced.

The launch of the computerized system revealed mass non-compliance with these Ukrainian immigration law requirements, and consequently this issue is now being considered by the Ukrainian government. The current system of employment immigration control is outdated and inconsistent with Ukraine's commitments to the WTO and the European Union. We anticipate that Ukrainian immigration law may be revised soon and that employment immigration procedures will be simplified. For the time being, however, Ukrainian companies should carefully consider how to comply with all of the relevant immigration and work permit requirements when employing foreigners, cumbersome though they may be.

New Documents Added to the Work Permit Application Package

The Cabinet of Ministers of Ukraine recently amended the

³The Department of State Employment Center under the Ministry of Labor of Ukraine.

⁴Items 11 and 19 of the "Regulation of the Cabinet of Ministers of Ukraine on Rules of entering into Ukraine of foreigners and stateless individuals, their departure from Ukraine and transit through its territory" No. 1074 dated December 29, 1995 as amended.

⁵The State Department of Migration under the Ministry of Internal Affairs of Ukraine.

rules for issuing work permits:⁶ a company that wishes to employ a foreigner must now submit a certificate to the employment authorities confirming that the foreigner's position is not required under law to be held by a Ukrainian citizen, and does not require access to knowledge of a state secret of Ukraine.

These amendments arose as a result of the privatization of some state entities, in which foreigners had been appointed to positions within that either required access to a state secret of Ukraine or were in positions that Ukrainian law stipulated could only be held by Ukrainian citizens.

Increase in the Penalty for Not Obtaining a Work Permit

The Ukrainian parliament recently passed a law⁷ that increased the penalty for employing foreigners without a work permit from UAH850 (approximately USD110)⁸ to UAH12,100 (approximately USD1,570). The penalty may be imposed on any Ukrainian entity for each foreigner that it illegally employs.

There is also a draft law⁹ currently being debated by the Ukrainian parliament that aims to increase the personal liability of a company's managers for employing foreigners without work permits. If the draft law is passed in its current form, the minimum penalty for a violation that could be imposed on a company's managers would increase from UAH850 (approximately USD110) to UAH1,700 (approximately USD220).

Abolition of Exemptions to the Work Permit Requirement

Ukrainian law formerly contained two exemptions from the requirement for foreigners who are self-employed or employed by Ukrainian companies to hold a work permit. The exemptions covered (i) foreigners performing work

⁶The Regulation of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Foreign Nationals and Stateless Persons to Obtain Work Permits" No. 2028, dated November 1, 1999, as amended on January 14, 2009.

⁷The law of Ukraine "On Amendments to Certain Laws of Ukraine for Decreasing the Impact of the Global Financial Crisis on Employment" No. 799-VI, dated December 25, 2008. The law came into effect on January 13, 2009.

⁸Conversion is done using the National Bank of Ukraine official exchange rate as of March 5, 2009, *i.e.*, UAH 7.7 to USD 1.

⁹Draft law of Ukraine "On Amendments to the Code of Administrative Offenses" (registration No. 2531, dated May 22, 2008). The draft law passed its first reading on January 16, 2009.

related to the Euro 2012 Championships in Ukraine, and (ii) foreigners assigned to work in Ukraine under product distribution agreements. Due to recent changes in Ukrainian legislation,¹⁰ these exemptions have been temporarily suspended for the period from January 13, 2009 through January 1, 2011. */J. Dakin, A. Kirmach*

¹⁰The law of Ukraine "On Amendments to Certain Laws of Ukraine for Decrease of the Impact of the Global Financial Crisis on the Field of Employment" No. 799-VI, dated December 25, 2008.

RECENT C&P DEVELOPMENTS

Chadbourne Lawyers Recognized as Leaders in Chambers Global 2009 Guide

The 2009 edition of Chambers Global: The World's Leading Lawyers for Business recognized Chadbourne & Parke's Russia & CIS Practice. Ten Russia & CIS Practice lawyers were recognized, including six in Moscow, two in Kyiv and two in Almaty were ranked as leading lawyers in their respective practice areas.

Areas ranked included Banking & Finance, Corporate/Commercial, Corporate/M&A, Dispute Resolution, and Energy & Natural Resources.

Chambers based the rankings in its directory on over 6,500 interviews conducted in 170 countries. They were carried out by a team of 30 full-time researchers over a period of 12 months. The qualities on which rankings were assessed included technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, commitment and other qualities most valued by the client.

Regarding Chadbourne as a whole, Chambers commented, "With its global network of almost 500 attorneys, the firm is positioned to analyze market, institutional and regulatory trends as they evolve, and offer clients a full range of legal services on virtually all matters affecting them. In addition to

its European work, the firm has established substantial practices in the Commonwealth of Independent States (CIS), Central Asia, the Middle East and Latin America."

Chadbourne Highlighted in International Law Office Client Choice Guide 2009

Chadbourne's Russia Practice, awarded the *International Law Office* (ILO) Client Choice Award for 2008, has been highlighted in the recently published International Law Office Client Choice Guide 2009.

The article highlights Chadbourne's nearly 20-year history in Russia and interviews partners Laura Brank, Mikhail Rozenberg and Shane DeBeer, who have all worked together for over a decade in the Russian practice. The article maintains that experience and familiarity in the market are some of the most valuable criteria when searching for a legal advisor and that Chadbourne, as a result of its long history and the senior team's experience working together, "provides exactly the kind of stability and experience that money cannot buy and that clients treasure."



A full copy of the International Law Office Client Choice Guide 2009 is available upon request, or a full version of the publication may be downloaded at: www.clientchoiceawards.com. To obtain the full text of the article, please visit www.chadbourne.com/publications.

February 19, 2009: Chadbourne Hosted Seminar on Changes to LLC Law in Russia

Chadbourne's Moscow office held an informal in-house seminar to address changes made to the LLC Law. On February 19, 2009, participants came to the event in Moscow to hear Counsel Evgenia Korotkova and Olga Koniuhova deliver a two-hour presentation on the changes to the LLC Law and answer general questions. Chadbourne's St. Petersburg office also conducted a seminar addressing the same topic on February 20, 2009.

AT THE PODIUM

April 1, 2009: Effective Waste Management and Recycling Use of Innovative Technologies

Chadbourne, as General Partner, the Russian business daily, Vedomosti, and The St. Petersburg Times are organizing in St. Petersburg, Russia an international conference on Effective Waste Management and Recycling and Use of Innovative Technologies.

The conference provides a unique forum for government, business and press representatives from St. Petersburg, the Leningrad Oblast and international specialists to meet in order to discuss waste management and recycling issues and realization of a related municipal infrastructure project in St. Petersburg.

The conference will address issues relating to waste management that have arisen in St. Petersburg and the Leningrad Oblast, suggest possible solutions to various problems associated with local waste management and recycling, discuss the adoption of new technologies, including nanotechnology, in connection with waste recycling and consider the issue of renewable energy in Russia.

In addition, participants will have the opportunity to analyze an actual case study for the reconstruction of a waste recycling facility located in Yanino (Leningrad Oblast), with representatives of local authorities, representatives of the Government of the City of St. Petersburg and international experts with significant experience with such types of projects in Europe and the United States.

Topics for discussion will include:

- utilizing PPPs in waste management projects – foreign experience,
- using innovative technologies in waste recycling, including nanotechnology,
- renewable energy,
- financing municipal waste management projects, and
- private investment.

Keynote speakers will include:

- Governor George E. Pataki, former Governor of the State of New York, now Counsel – Chadbourne & Parke LLP (New York)
- John P. Cahill, former Commissioner of New York State's Department of Environmental Conservation, now Counsel, Chadbourne & Parke LLP (New York)
- Laura M. Brank, Managing Partner – Moscow and St. Petersburg offices, Chadbourne & Parke LLP, and Head of the Russia & CIS Practice
- Sheila S. Gwaltney, Consul General of the United States of America in St. Petersburg
- Irina Skidan, Counsel, Chadbourne & Parke LLP (St. Petersburg)
- Jacek Kosiński, European Counsel, Chadbourne & Parke LLP (Warsaw).

Also speaking will be representatives of the Government of the City of St. Petersburg, the European Bank for Reconstruction and Development (EBRD), Vnesheconombank (VEB), and the RF Ministry of Economic Development and Trade, as well key private sector players.

For more information on the event, please visit:
www.chadbourne.com/events/2009/wastemanagement.

May 11, 2009: Global Pacific & Partners' 2nd Annual Europe Upstream, Amsterdam

Shane DeBeer will speak on "State-Owned & Private Project A&D, Restructuring & Finance Options" at 2nd Europe Upstream in Amsterdam on May 11.

The event focuses on Europe and Eurasia and is designed for global oil and LNG industry executives.

The event concentrates on exploration development, new investment, oil, gas and LNG projects, energy law and oil finance, contracts and acreage licensing.

For more information or to register, please visit Global Pacific & Partners' website at: www.glopac.com.

AT THE PODIUM

May 27-9, 2009: The Energy Exchange's 9th Annual CIS Oil & Gas Summit, Paris

Ken Mack and Victor Mokrousov will be participating in The Energy Exchange's 9th Annual CIS Oil & Gas Summit in Paris on May 27-9. Mr. Mack will be moderating Session Eight, "Export from the Caspian region to international markets," on May 28, while Mr. Mokrousov will be speaking on "Updates to the Kazakhstan Subsoil Law" in Session Two on May 27.

The event has a nearly decade-long tradition of attracting over 230 influential industry executives key from 29 countries. The conferences focuses on such important topics as policy and legislation developments, first hand updates on key upstream and transportation projects, future prospects for regional development, financing of the sector and opportunities for investment.

For more information or to register, please visit The Energy Exchange's website at: www.theenergyexchange.co.uk.

CIS LEGAL NEWSWIRE

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