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RUSSIA

## Supreme Arbitration Court Restricts Ability of Imposition of Protective Measures Designed to Prohibit the Convening of a General Shareholders' Meeting

On July 9, 2003, the RF Supreme Arbitration Court issued Resolution No. 11 which restricts the ability of parties to seek protective measures from arbitration courts where such protective measures would prohibit the convening of a general shareholders meeting ("GSM").

Resolution No. 11 states that when considering certain disputes, arbitration courts may not prohibit a joint stock company, its bodies or shareholders from conducting an annual or an extraordinary GSM. According to the Resolution, such disputes include, but are not limited to, (i) appealing a decision made by the management bodies of a joint stock company; (ii) invalidating a transaction involving shares of a joint stock company; (iii) applying the consequences of the invalidity of such transaction; and (iv) invalidating the issuance of shares by a joint stock company. The Resolution goes on to provide that arbitration courts may not impose protective measures which even indirectly resemble a prohibition against conducting a GSM, i.e., including the preparation of a list of shareholders entitled to participate in the GSM, the distribution of voting ballots, or the calculation of voting results.

At the same time, the Resolution permits arbitration courts to prohibit (i) an annual or extraordinary GSM from making decisions on certain issues on the agenda if the issues fall within the subject of the dispute or are directly related to the dispute; and (ii) the joint stock company, its bodies or shareholders from executing certain decisions made by the GSM.

The Supreme Arbitration Court noted that protective measures must conform to the protection sought in the claim, i.e., the protective measures must directly relate to the subject of the dispute, be proportionate to the protection sought in the claim, and be necessary and sufficient to secure the execution of a court decision or to prevent damage which the plaintiff may incur.

The Resolution provides that when considering issues related to the imposition of protective measures, an arbitration court must make certain that the rejection of a particular requested protective measure will impede or make impossible the execution of a decision rendered by a court with respect to the dispute. The execution of a court decision is recognized to be impeded if, e.g., the plaintiff is forced to address the arbitration court anew despite having previously obtained a court decision.

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If a plaintiff argues that the arbitration court's failure to impose a protective measure will result in the plaintiff incurring material harm, then the plaintiff must prove (i) the possibility the plaintiff will suffer such harm, (ii) that the harm will be of a substantial amount, (iii) there exists a connection between the possible harm and the subject of the dispute, (iv) and the particular protective measure sought is necessary and sufficient to prevent the harm sought to be avoided.

Clearly, Resolution No. 11 represents a further and positive legal step in attempting to reduce potentially oppressive corporate tactics, which in recent years were often successfully used to prohibit the convening of GSMs through the imposition of protective measures as a result of sham arbitration proceedings. /A. Kelina

## New Obstacles to the PSA Regime?

On June 10, 2003, RF Law No. 65-FZ, "On Introducing Additions to Part Two of the RF Tax Code, Introducing Amendments and Additions to Certain Other RF Legislative Acts and Declaring Certain RF Legislative Acts Invalid," ("PSA Amendment" or "Amendment"), came into force and introduced certain noteworthy changes to the Production Sharing Agreement ("PSA") regime.

In brief, the Amendment makes the procedure for entering into a PSA more complex. Under the new PSA regime, only a federal law may determine the list of tracts available for exploration under PSAs (as opposed to the previous vaguer regime where the Government could also determine this list). In other words, for a subsurface tract to become available for PSA development there must be a federal law which specifically approves of the use of the tract for this purpose. Under the Amendment, a tract now may be included on the list of tracts available for exploration under PSAs only if it is impossible to explore this tract under another regime, i.e., under the regime provided for by the RF Law "On Subsoil." A tract is included on the list of tracts available for exploration under a PSA regime on the condition that it is impossible to explore the tract under another regime, which should be evidenced by an unsuccessful auction for the development of a land tract under such other regime. After the tract has been in-

cluded on the list of tracts available for exploration under a PSA, another auction must be held to determine the investor with whom the PSA may be concluded.

The Amendment is also designed to provide additional protection to the interests of Russian manufacturers. By virtue of this Amendment, each PSA must provide that on an annual basis, the investor is obligated to purchase necessary technical equipment and materials of Russian manufacturers of up to at least 70% of the total value of purchased equipment and materials. Prior to the enactment of the Amendment, the investor was not required to fulfill the content requirements on a yearly basis.

The Amendment introduces a special tax regime, which is applied on the condition that: (i) the PSA is concluded after an auction for the tract has failed, so long as the auction was held for the exploration of a tract under the RF Law "On Subsoil"; (ii) the State's share of the total value of production under a PSA is not less than 32%; and (iii) the PSA provides for an increase in the State's share of the total value of the production in the event of an increase in indicators of "investment effectiveness" for the investor in the course of implementing the PSA.

The Amendment provides a list of taxes and duties which the investor is obligated to pay depending on whether the production sharing method is direct or indirect. The Amendment states that regional and local state authorities have the power to exempt an investor from regional and local taxes. The Amendment also provides that the State's portion of production shall be reduced by the amount of taxes and duties actually paid when an investor is not granted tax exemptions by regional and local authorities.

Under the Amendment, the investor under a PSA must submit annually to the appropriate tax inspectorate a separate tax declaration for each tax due, as well as a schedule of works and a budget of expenditures.

The provisions of the PSA Amendment governing the new procedure for concluding a PSA do not effect (i) already functioning PSA projects (Sakhalin-1, Sakhalin-2 and Khariagin-skoye); (ii) tracts located on the continental shelf and/or in the exclusive economic zone; and (iii) tracts "the possibility of

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development of which is provided for by international treaties," to which the RF is a party.

Most energy experts believe this PSA Amendment will discourage further development under the PSA regime, and that it is clearly a step backwards from the long-standing efforts by the investment community to improve the PSA law in a manner that would encourage investment. / P. Seferovich, A. Kelina

## Russian Constitutional Court Ruling Clarifies Aspects of Antimonopoly Regulation on the Financial Markets

The Constitutional Court of the Russian Federation (the "Court") ruled earlier this year that the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship (the "Antimonopoly Ministry") does not have the authority to issue binding instructions to the Central Bank of the Russian Federation (the "Central Bank") and that acts of the Central Bank violating the Federal Law "On Protection of Competition on the Financial Services Market", dated June 23, 1999 (as amended) (the "Financial Competition Law"), may be contested in courts.

The Antimonopoly Ministry initiated proceedings against the Central Bank, alleging that the Central Bank's rules on the mandatory conversion of foreign currency proceeds violated antimonopoly regulations. The Antimonopoly Ministry based its allegations on the Financial Competition Law, which regulates: (i) financial organizations having a dominant market position; (ii) agreements restricting competition in the financial markets (including agreements with state agencies); and (iii) actions of state agencies which unjustly restrict competition. The Financial Competition Law grants broad powers to the Antimonopoly Ministry to regulate competition in the securities, banking and insurance markets. The powers of the Antimonopoly Ministry under the Financial Competition Law overlap to some extent with the competence of the state agencies regulating the securities, banking and insurance markets, including the Central Bank. The overlap of powers between the Antimonopoly Ministry and the Central Bank led

to the dispute submitted for resolution to the Constitutional Court.

The Court addressed the issue of whether the Antimonopoly Ministry has sufficient authority under the Financial Competition Law to issue binding instructions to the Central Bank on the grounds of alleged violations of antimonopoly regulations. In considering the matter, the Court first discussed the status of the Central Bank under the RF Constitution. The Court noted that the constitutional function of the Central Bank is "to protect and ensure the stability of the Ruble" which the Central Bank does "independently from other state bodies" (RF Constitution, Article 75, Section 2). The Court referred to its earlier ruling of December 14, 2000, regarding the special status of the Central Bank under the RF Constitution, in which the Court affirmed the Central Bank's power to revoke commercial banks' banking licenses without court proceedings based on the Central Bank's constitutional function to "ensure and protect the stability of the Ruble" and broad oversight powers in the banking sector.

The Court further pointed out that the regulatory functions of the Central Bank, set forth in the RF Constitution, "imply the necessity to ensure . . . guarantees against unjust intervention by other state bodies in the Central Bank's implementation of its functions." The Court emphasized that one of such guarantees was "the special nature of relations between the Antimonopoly Ministry and the Central Bank," noting that these relations must be distinguished from the Antimonopoly Ministry's relations with other state agencies.

Analyzing specific powers granted to the Antimonopoly Ministry under the Financial Competition Law, the Court concluded that the Financial Competition Law does not give the Antimonopoly Ministry authority to issue binding instructions to the Central Bank. The Court stated that the Antimonopoly Ministry may only provide recommendations and suggestions (as opposed to binding instructions) to the Central Bank, recommending (but not instructing) to revoke or to suspend regulations issued by the Central Bank that, in the view of the Antimonopoly Ministry, contradict antimonopoly laws.

Simultaneously, however, the Court ruled that neither the Central Bank nor other state agencies may "issue normative

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legal acts and/or perform actions limiting competition on the market of financial services," which is prohibited by the Financial Competition Law (Article 12), and that legal acts of state agencies that allegedly violate the Financial Competition Law may be contested in courts in accordance with existing procedures. The Court noted that the restriction "does not in any way diminish the independent status of the Central Bank or violate the Central Bank's constitutional powers."

By resolving this dispute, the Court made an important clarification with respect to the scope of the Financial Competition Law. Still, it is likely that the Financial Competition Law, which established a regime of joint oversight by the Antimonopoly Ministry and the Central Bank, as well as other regulatory agencies, of competition in the financial markets, will require further clarification on its application, specifically on how the agencies should divide their authority in the regulatory process. / I. Glotin

## New Telecommunications Law is Finally Adopted

On July 7, 2003, President Putin signed RF Law No. 126-FZ "On Communication" (the "New Telecommunications Law") drafts of which have been under discussion for the past several years. The New Telecommunications Law will come into effect on January 1, 2004, except for certain provisions related to the payment obligations of certain classes of privileged users of communication services (e.g., pensioners) that are slated to become effective on January 1, 2005.

The New Telecommunications Law both expands upon provisions already existing in RF Law No. 15-FZ "On Communications," dated February 16, 1995 (currently in effect) and introduces other new concepts previously not addressed. The New Telecommunications Law clarifies the procedures governing inter alia: (i) licensing; (ii) the connection of telecommunications networks to one another and their interaction, and (iii) the distribution of radio frequencies.

The New Telecommunications Law additionally provides for a new category of operators that are defined as operators controlling a significant portion of the public communications network and sets out various provisions aimed at ensuring that such operators do not abuse their market positions. An

operator will fall within this new category if it, together with its affiliates, owns at least 25% of the installed capacity, or controls the conduct of transmission of at least 25% of communications traffic, either in a particular region of the RF or throughout the RF as a whole. These significant operators are prohibited from refusing to enter into telecommunications network connection agreements with other operators. Additionally, they must offer similar terms and conditions to all other operators to connect to its telecommunications network and/or transmit traffic, and such conditions may be changed no more than once a year. The network connection prices, as well as traffic transmission prices, offered by dominant operators are subject to governmental regulation.

Further, key elements of the New Telecommunications Law are the provisions relating to: (i) universal communications services and the rules applicable thereto; (ii) the change in the legal status of dedicated communications networks; and (iii) the designation of certain communications facilities as immovable property.

The most controversial issue surrounding the New Telecommunications Law is the regulation of universal communications services. According to the New Telecommunications Law, universal communications services may be of two types: (i) public pay phones; and (ii) services related to data transmission and the provision of access to the Internet through the use of collective access stations.

An operator that will provide universal communication services must be selected through an open competition. If, however, no operator desires to provide such services in a particular region, then a controlling operator meeting the requirements described above may be obligated by the RF Government to provide the required services in that region. If such operator incurs losses resulting from its provision of obligatory universal communications services, those losses are recoverable from a special reserve, funded from obligatory payments to be paid by all public communications network operators. The intended purpose of the fund is to encourage the development of the telecommunication infrastructure. However, the New Telecommunications Law fails to set out a specific mechanism to ensure that payments from this reserve fund actually reach the proper operator.

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Under the New Telecommunications Law, communications facilities that are fixed to a land plot and which are unable to be moved without causing disproportionate harm to their use, including primary cable facilities, are considered immovable property and, therefore, the rights thereto and transactions therewith are subject to state registration.

The procedure for providing telephone services with respect to a dedicated communications network has also changed. Previously, due to inconsistencies in the law, operators of dedicated networks were able to transmit international traffic by connecting to foreign operators of public communication networks. The New Telecommunications Law clearly forbids operators of dedicated networks to connect to both Russian and foreign public communications networks. Experts agree that this prohibition is likely to lead to significant losses for dedicated communications network operators that connect their international traffic directly with foreign public communications networks.

Under the New Telecommunications Law, the provision of communication services to individuals is regulated in greater detail. For example, a subscriber is now entitled to keep such subscriber's number in the event of a change in address (if technically possible). A subscriber may also choose whether to pay for local telephone services on a fixed or time-rate plan. The economic impact of this provision is unclear, but certain operators expect a significant decrease in profit for communications network operators.

Communications network operators have expressed varying views as to the impact of the New Telecommunications Law. Some operators consider the New Telecommunications Law an improvement as it offers clarity on issues long left unaddressed. Other operators are concerned that the new law will significantly hinder their business as previously conducted. Operators not satisfied with certain provisions in the New Telecommunications Law have indicated that they may challenge such provisions in the RF Constitutional Court.  
/A. Kelina

## The RF Central Bank Clarifies Rules for Mergers of Banks and Issuance of Securities by Banks

On June 3, 2003, the RF Central Bank (the "CBR") issued a regulation "On Reorganization of Credit Organizations in the form of Mergers" (the "Regulation"), which was registered with the RF Ministry of Justice on July 7, 2003. Generally, the Regulation is based on the premise that merging banks and their branches will become branches of a surviving bank, and the Regulation outlines the procedures to be followed by banks with respect to two types of reorganizations: (a) an acquisition whereby a bank is merged into another surviving bank and (b) a merger whereby participating banks are merged into a single bank.

This Regulation provides not so much the rules applicable to mergers, but rather outlines the technical issues involved in the process, such as operating of correspondent accounts, cash centers and other similar matters. The Regulation does, however, impose upon banks certain reporting obligations not found in general civil and corporate law. In particular, the Regulation requires that banks inform the Central Bank of Russia ("CBR") within 5 days after the approval of the agenda of a general meeting of shareholders or participants in a bank when the agenda includes an item on the proposed reorganization of the bank in the form of a merger. The delivery of such notice to the appropriate CBR office triggers the CBR's right to inspect such bank with regard to its compliance with applicable banking regulations. The Regulation stipulates that such inspection should be conducted so that the time period outlined for the merger is complied with. If a merger decision is approved, a further notice must be delivered to the CBR.

With respect to the issuance of securities by banks, after the enactment of substantial revisions to the RF Law "On Securities Market," which became effective on January 4, 2003, the CBR, by its Ordinance No. 1288-U, dated June 3, 2003, amended Regulation No. 102-I "On Rules for Issuance and Rea-

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istration of Securities by Credit Organizations," dated July 22, 2002 (the "Issuance Regulation"), to bring the Issuance Regulation into compliance with the amended Securities Market Law. Along with the general questions related to the registration of an issuance of shares of a credit institution, the amended Issuance Regulations set forth rules applicable to issuance of the bonds, secured bonds, and options on the shares of banks. Essentially, these revisions restate the provisions of the Securities Market Law. / K. Konstantinov

## Segregation of the Courts of Appeal into a Separate Level of Arbitration Courts is a Further Step in Russian Judicial Reform

The previous system of arbitration courts consisted of three levels: (i) 81 arbitration courts of the subjects of the Russian Federation in which trial courts and courts of appeal were combined as two instances of the same court; (ii) 10 arbitration courts of cassation appeal - courts of federal circuits; and (iii) the RF Supreme Arbitration Court.

The fact that trial courts and the courts of appeal (which are required to reconsider the cases resolved by trial courts) were located in the same building being simply different instances of the same court significantly depreciated the effectiveness of appeal at this level.

In order to increase the effectiveness of an appeal in arbitration proceedings, according to the ongoing reform of the Russian judicial system, the appellate instance of the arbitration courts of the subjects of the Russian Federation were segregated into courts of separate levels. According to Federal Constitutional Law No. 4-FKZ "On Changing and Amending the Federal Constitutional Law On Arbitration Courts of the Russian Federation," dated July 4, 2003, there shall be organized 20 courts of appeal segregated from trial courts. The new courts of appeal should begin hearing cases by January 1, 2006. This segregation should increase the effectiveness of the appeal process in arbitration proceedings.

/ K. Konstantinov

### KAZAKHSTAN

## New Regulation of Kazakh Financial Market and Institutions

On July 4, 2003, the Republic of Kazakhstan adopted Law No. 474-II ZRK "On the State Regulation of, and Supervision over, the Financial Market and Financial Institutions" (the "Law") The Law will become effective on January 1, 2004.

This Law is designed to regulate financial markets and financial institutions and aims to improve the financial system in the Republic of Kazakhstan. The Law further aims to create a legal framework that would prevent violations of consumers' rights in the financial services sector, to ensure the establishment of equal conditions for the activities of financial institutions, and to stimulate fair competition in the financial markets.

Implementation of the Government's regulation of financial markets and institutions in Kazakhstan is based on several policy considerations. They include, among other things, creation of incentives for the improvement of corporate governance of financial institutions, distribution of supervisory resources among the financial market segments mostly susceptible to risk so as to maintain financial stability, and introduction of modern technologies to ensure the completeness and accessibility of information for consumers about the activities of financial organizations.

Pursuant to the Law, only individuals licensed in accordance with the requirements of Kazakh law may engage in professional activities in the financial market. Transactions with respect to the provision of financial services conducted by unlicensed individuals shall be deemed invalid. The state agency authorized to grant licenses for professional activity in the financial market (the "Licensing Authority") is designated by the President of the Republic of Kazakhstan.

Under Kazakh law, the Licensing Authority will be authorized to regulate banking and insurance activities, to issue and recall permits to establish financial organizations and their sub-

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divisions, to determine procedures for the issuance of such permits, and to administer voluntary reorganization and liquidation of financial organizations.

To the extent of its authority granted by legislative acts of the Republic of Kazakhstan, the Licensing Authority has autonomous decision-making power. With certain exceptions, other state agencies have no right to interfere with the Licensing Authority's activities if such activities are within the scope of the Licensing Authority's delegated powers or related to the exercise of such powers.

It is hoped that the adoption of the Law and the activities of the Licensing Authority will further stabilize the financial services sector in Kazakhstan and will improve the quality of financial services generally. /Y. Zhussupov.

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