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RUSSIA

LLC Law Amendments Signal Positive Step Forward but Issues Still Remain

On December 30, 2008, President Dmitry Medvedev signed into law Federal Law No. 312-FZ "On the Making of Amendments to Part 1 of the Civil Code of the Russian Federation and Other Laws of the Russian Federation" (the "Amendments"), which alters the more than a decade long corporate regime governing Russian limited liability companies ("LLCs") and allows interest holders in LLCs (known as participants) more flexibility in structuring relations among themselves and with the company. On the other hand, the Amendments introduce some new, more burdensome requirements, particularly related to transfers of interests in LLCs. The Amendments become effective on July 1, 2009 and require changes to be made to the respective individual charters of LLCs by January 1, 2010. This article provides a brief overview of the principal changes to Federal Law No. 14-FZ "On Limited Liability Companies", dated February 8, 1998 (the "LLC Law") introduced by the Amendments.

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UKRAINE

Ukraine Considers Amending Import Duty Regime

In response to the global financial crisis that reached Ukraine in the final quarter of 2008, resulting in the approval of a $16.4 billion stand-by arrangement from the IMF, the Ukrainian Parliament recently passed legislation that is ostensibly intended to alleviate the effects of its impact.

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KAZAKHSTAN

Kazakhstan Passes New Competition Law to Respond to Market Changes

The requirements of Kazakhstan's rapidly developing economy and an increasing recognition of the role of legislation in influencing economic activity have created a need for more sophisticated regulation of the market. In recognition of this need, a new Law on Competition was promulgated on December 25, 2008 (the "Competition Law"), by which the Kazakhstan

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Participation Agreements

In a revolutionary break with past practice, participants will now be allowed to enter into an agreement governing the manner in which their rights in the LLC are realized. Although entering into shareholder and participation agreements is a widely accepted practice, their enforcement in Russia prior to the adoption of the Amendments has always been questionable. In a participation agreement, participants will be able to agree to vote certain ways, provide for put or call options over their interests at an agreed price, and refrain from selling their interests before certain events occur. The participants may also coordinate and agree on other aspects of the management, existence, reorganization and liquidation of the LLC. Although the way in which Russian courts will enforce the specific provisions of participation agreements remains to be seen, the ability to enter into participation agreements will make LLCs a significantly more attractive business form for Russian entities.

Exit of Participants Curtailed

Under a very controversial provision of the current LLC Law, a participant may exit the LLC at any time without the consent of the other participants (or the LLC) and receive "actual value" for its interest. In practice, such an unlimited right on the part of a participant created significant difficulties for LLCs in obtaining financing and underscored the instability of the company, although minority participants frequently appreciated the ability to exit the LLC at will.

Under the Amendments, after July 1, 2009, a participant may exit the LLC only if such right is established in the charter. If an LLC's current charter does not contain a participant exit provision, participants will not be able to exit the LLC using the withdrawal declaration after July 1, 2009, unless the charter is amended to that effect.

Constitutional Documents

Foundation agreements will no longer be treated as constitutional documents, although founders will still need to enter into them to regulate certain aspects of organizing the LLC, as well as the procedures for paying for interests and certain other matters. This change allows the participants to avoid potential disputes over precedence if provisions of the foundation agreement and the charter of the LLC conflict.

Information on Participants

Information regarding the size and nominal value of the interest of each participant will be maintained in the Unified State Register of Legal Entities (the "State Register") and will be publicly available. In addition, the LLC itself will be required to maintain a list of its participants and their interests, with participants being required to provide the LLC with updated information to keep the list current.

Transfer of Interests

In contrast to their generally liberalizing character, the Amendments make the procedure for transferring an interest in an LLC more cumbersome and time-consuming.

With very few exceptions, transactions involving an interest in an LLC will need to be notarized by a notary public. Failure to notarize will result in the transaction being considered void.

Upon notarization, the notary public will be required to formally submit an application, signed by the seller and supported by applicable documents, to the authorities that maintain the State Register, requesting them to record an entry reflecting the change in ownership of the interest in the LLC. The notary public will also be required to provide a copy of all of the foregoing to the LLC unless the parties agree to do so directly.

The new notarization requirement can result in an unanticipated consequence. Experience shows that Russian notaries may be reluctant to notarize transaction agreements that are not governed by Russian law. It remains to be seen how the notarization requirement will impact on the contractual choice of law provisions.

Timing of Transfers of Title to Interests

Under the current LLC Law, ownership rights to an interest are considered transferred when the LLC is notified of the transfer. Due to the absence of interest holders' registers, determining the date on which interests in an LLC have been transferred is rarely simple in practice.

The Amendments create certainty in this regard and provide less risk that an interest will be transferred improperly. Under the Amendments, title to the interest is considered transferred from the moment the transaction is notarized. When notarization is not required, title to the interest is considered transferred at the time an entry is

made in the State Register recording the transfer.

Pledge of Interests

Under the current LLC Law, there is no system to record pledges of interests. The Amendments introduce an objective one. A pledge agreement will be considered void unless it is notarized by a notary public. Within 3 days from the date of notarization, the notary public will be required to formally submit an application signed by the pledgor to the authorities that maintain the State Register, requesting them to record an entry reflecting the encumbrance over the pledgor's interest in the LLC. This information will be publicly available. The notary public will also be required to notify the LLC regarding the existence of the pledge. Thus, the changes should allow creditors to gain comfort that their pledges over interests in an LLC have been properly registered and perfected. The lack of a public registry has prevented some creditors from taking security over interests in an LLC as they were uncertain about the enforceability of such pledges.

Other Important Changes

Under the Amendments, participants will be able to exercise their right of first refusal to purchase interests offered for sale to third parties at a price offered to the third party or at the price established in the charter. This charter price can be established as a fixed amount or it can be based on objective criteria that will allow the price to be determined in the future. While it remains to be seen how this approach will be applied in practice, it provides an opportunity for developing a more competitive balance among participants in an LLC.

The Amendments contain a significant number of other changes and clarifications to the provisions of the current LLC Law dealing with, for example, alienation of interests, rights of first refusal, obligations on the part of the LLC to redeem the interest of a participant in certain circumstances, and approval of major and interested party transactions. A significant number of lesser changes remove ambiguities and improve the organizational structure of the LLC Law.

Amendment of Constitutional Documents

No later than January 1, 2010, the constitutional documents of an LLC organized prior to the effective date must be amended to comply with the requirements of the Amendments. From the effective date of the Amendments and until the constitutional documents are amended, foundation agreements and LLC charters will be effective only to the extent they do not contradict the provisions of the amended LLC Law and Part 1 of the amended Civil Code.

A right of exit may be included in the initial charter (adopted unanimously) of an LLC formed on or after July 1, 2009 or if the meeting of the participants of an LLC formed on or after July 1, 2009 later unanimously resolves to amend the charter to include it. Consequently, a minority interest holder can block the adoption of an initial or an amended charter containing an exit provision. Different rules apply to LLCs formed prior to July 1, 2009. For such LLCs, until January 1, 2010, the resolution for amending the charter for this purpose may be taken at a meeting of the participants by a 3/4 majority vote of the total number of votes of all of the participants of the LLC. Apparently after January 1, 2010, such a resolution will require the unanimous vote of the participants, with the possibility of minority interests blocking the vote. The existing general requirement of a 2/3 majority vote (unless otherwise specified by law or by the charter) continues to apply for all other charter amendments.

The authorities responsible for registering legal entities will be responsible for making the initial entries of participant information into the State Register based on the registered version of the foundation agreement in effect on the date of registration of the charter amendments referred to above. The State Register record will be considered accurate unless proven otherwise by documents required to be notarized in connection with a transaction involving an interest in an LLC, by a statement signed by all of the participants or by a court decision.

Conclusion

Overall, the Amendments contribute to the improvement of the current LLC Law. On the other hand, they also introduce a number of burdensome requirements, and they do not address certain other provisions requiring attention, such as the requirement that 50% of the interests need to be paid for by the time of state registration of the LLC. Nor do they increase the existing threshold for in-kind payments for interests that require appraisal by independent appraisers. Consequently, while there is still considerable room for improving the corporate legislation of the Russian Federation, the

Amendments take a definite step in the right direction. It does remain to be seen, however, how the amended LLC Law will work in practice. Changes introduced by the Amendments raise a significant number of questions and concerns that may be addressed in future amendments of Russian corporate legislation or in the rulings of Russian courts resolving disputes based on the new rules introduced by the Amendments./A. Kalinov, I. Skidan

Major Amendments Introduced to Russian Bankruptcy Law and Foreclosure Procedures

At the end of 2008, the Russian Parliament adopted and the President approved the long-expected amendments to the laws regulating the foreclosure procedure in Russia. Law No. 306-FZ "On Amending certain legislative acts of the Russian Federation in connection with improvement of the foreclosure procedure on pledged property" dated December 30, 2008 (the "Law on Amendments"), introducing the amendments, came into force on January 11, 2009. The Law on Amendments amends the RF Civil Code, the Federal Law No. 2872-1 "On Pledge", dated May 29, 1992 (the "Law on Pledge"); the Federal Law No. 102-FZ "On Mortgage (Pledge of Immovable Property)", dated July 16, 1998 (the "Mortgage Law"); the Federal Law No. 122-FZ "On the State Registration of the Rights to Immovable Property and Transactions Therewith", dated July 21, 1997; the Federal Law No. 229-FZ "On Enforcement Proceedings", dated October 2, 2006 ("Enforcement Proceedings Law"); the Federal Law No. 4462-1 "On Foundations of the Legislation on the Notary Service", dated February 11, 1993 ("Legislation on Notary Service"); and the Federal law No. 127-FZ "On Insolvency (Bankruptcy)", dated October 26, 2002 (the "Bankruptcy Law").

Amendments to Foreclosure Procedure under the Law on Amendments

One of the major achievements of the Law on Amendments is that it expands the cases where extrajudicial foreclosure is permitted and stipulates the pledgee's rights in the event of the pledgor's failure to comply with the out-of-court enforcement procedure agreed by the parties. Prior to the Law on Amendments, out-of-court foreclosure over movable assets was permitted by law, but did not protect the pledgee where the pledgor failed to comply with the foreclosure procedure established by the parties in an enforcement agreement. With respect to mortgages, previously a foreclosure over mortgaged property without court proceedings was only possible under a separate notarized agreement that should have been entered into when the grounds of foreclosure had occurred (*e.g.*, after an event of default by the debtor which was almost impossible to apply in practice). Now, out-of-court foreclosure on pledged property (both movable and immovable) may take place based on an agreement on extrajudicial foreclosure between a pledgor and a pledgee ("enforcement agreement") if the law does not provide otherwise. The enforcement agreement can be concluded at any time or can be included in the pledge or mortgage agreement itself (the execution of the enforcement agreement requires the pledgor's notarized consent to the extrajudicial foreclosure procedure (i) in case of a mortgage agreement or (ii) if the pledgor of the movable property is an individual). If the pledgor fails to comply with the terms of the enforcement agreement, the pledgee is entitled, if it is not prohibited by law, to apply for a notary enforcement record (*исполнительная надпись*) by filing with the notary public the documents required pursuant to Article 90 of the Legislation on Notary Service and then applying to the court marshals with (i) an application to foreclose on the pledged property in accordance with the Enforcement Proceedings Law, or (ii) an application to seize the pledged property for the purpose of the subsequent foreclosure in accordance with the enforcement agreement.

Under the RF Civil Code, the sale of the mortgaged property is to be executed in accordance with the Mortgage Law, and the pledged movable property is sold in accordance with the Law on Pledge. The Law on Pledge has been supplemented by a description of such procedure.

In the case of an out-of-court foreclosure on the pledged *movable* property, the pledgee shall notify the pledgor of the commencement of the foreclosure procedure. Such notification shall specify the name of the pledged property; the amount due to the pledgee under the secured obligations; the way in which the pledged

property will be sold (provided for in the enforcement agreement) and the initial tender price for the pledged property. The foreclosure on the pledged property can be undertaken upon expiration of the time period specified in Section 3 of Article 24.1. of the Law on Pledge.

In the case of an out-of-court foreclosure on the pledged *immovable* property, the pledgee or the sale organiser shall provide the pledgor with a notice asking to satisfy the secured obligation in the amount set forth therein and stating that the pledgee would foreclose on the pledged property, if such obligation has not been satisfied within the term set forth therein. The foreclosure on the pledged property can be undertaken upon expiration of the time period specified in Section 9 of Article 59 of the Mortgage Law.

The RF Civil Code and the Mortgage Law have supplemented the list of cases in which the foreclosure must be carried out with recourse to the courts. The judicial foreclosure procedure is now required, *inter alia*, in the case of a foreclosure on residential premises owned by individuals, in the absence of the description of the foreclosure procedure over movable property in the enforcement agreement between a pledgor and a pledgee, or where it is impossible to follow such procedure, or in the case of a mortgage over state or municipally owned property.

As mentioned, the foreclosure procedure applying to movable property is detailed in the Law on Pledge and is rather similar to the procedure which already exists with respect to immovable property.

Pursuant to the amendments to the Law on Pledge, in the event of a judicial foreclosure, pledged *movable* property must be sold through a public sale in accordance with the Enforcement Proceedings Law. In the event of a levy of execution without recourse to the courts, the pledged *movable* property may be foreclosed through any of the following enforcement proceedings: (i) a public sale of the pledged property organised by the pledgee, a specialised organisation or a third person; (ii) a sale of the pledged property to a third person without organising the public sale, including by sale pursuant to an agency agreement (*договор комиссии*) to be entered into between the pledgee and the agent; (iii) a transfer of the ownership title to the pledged property to the pledgee. The sale proceeds (or the purchase price) under the sale and purchase agreement in respect of the pledged property are used to discharge the secured obligations.

The new enforcement proceedings should facilitate considerably foreclosure procedures on pledged movable property.

The Law on Pledge has been supplemented by the list of situations in which the sale price of the pledged property must be determined by an independent appraiser. For instance, in an out-of-court foreclosure, the market price of the pledged property must be determined by an independent appraisal, *inter alia*, in case of the foreclosure over unlisted securities or if the value of the pledged property under the pledge agreement exceeds 500 000 rubles. The sale price of pledged movable property under an agency agreement must be equal to the market price determined by an independent appraiser as well.

The RF Civil Code has introduced other important amendments, including the following:

(a) in case of foreclosure on a second-ranking pledge, the first-ranking pledgee acquires the right to accelerate the secured claims (which have not matured yet) and obtain satisfaction of its claims from the pledged property. If a first-ranking pledgee does not enjoy this right, the pledged property is transferred to a new owner encumbered by the first-ranking pledge; and

(b) the RF Civil Code provides for new criteria related to an "insignificant" breach of secured obligations, in which case, foreclosure procedures on the pledged property may not be initiated.

Rights of the Pledgee in Bankruptcy

The Bankruptcy Law as amended by the Law of Amendments changed the rights of the secured creditor and foreclosure procedure in the event of a pledgee's bankruptcy.

It was established that in a debtor's bankruptcy, a creditor holding a pledge given by the debtor to secure a third party's obligations is treated as a creditor that has been granted a pledge over the debtor's property to secure the debtor's obligations towards such creditor. Previously this was not the case. Accordingly, this change is favourable and strengthens the position of a creditor holding third party security.

It was further set out that upon commencement of the supervisory procedure, the foreclosure over pledged assets in out–of-court proceedings is not allowed.

According to Section 3 of Article 63 of the Bankruptcy Law, for the purpose of a creditor's participation in a bankruptcy case, the debtor's payment obligations which have arisen prior to the date the arbitrazh court accepted the application for the debtor's bankruptcy shall be deemed due and payable. The creditors with such claims are entitled to submit their claims to the arbitrazh court for the purpose of their registration in the debtor's register of creditors. This is a positive development for the debtor's creditors.

During financial recovery and external management, the court (following the application of a "bankruptcy creditor") has the right to order foreclosure on pledged assets (unless the debtor proves that the foreclosure would make restoration of solvency impossible). The bankruptcy creditor has the right to waive its right to the proceeds from the sale of the pledged property.

The secured creditors are entitled to vote at the creditors' meetings only in the following cases: (i) during the supervisory procedure, and (ii) during the financial recovery and external management if the secured creditor has waived its right to foreclose on the pledged property, or the arbitrazh court has rejected the secured creditor's application to foreclose over the pledged property. In other cases, the secured creditors are entitled to participate at the creditors' meetings without the right to vote. This constitutes a more restrictive approach to voting by the secured creditor.

The procedure for applying the funds from the sale of the pledged property during the receivership proceedings was changed. In a sale of the pledged property securing debtor's obligations under loan agreements, 80% of the recovered amount will be applied to satisfy secured creditors' claims (but no more than the principal amount and interest, i.e. no fees and other payments are covered) and the remaining amount will be put into a special bank account, of which 15% shall be applied to discharge obligations of creditors of first and second order of priority (i. e. personal injury, claims from employees, etc.) and the remaining 5% shall be applied towards the payment of court expenses and bankruptcy managers.

In other cases, funds from the sale of the pledged property shall be applied as follows: (i) 70% - for discharging secured obligations; (ii) 20% - for discharging obligations of creditors of first and second order of priority; and (iii) 10% - for payment of court expenses and bankruptcy managers.

Mortgage Certificates

New amendments were introduced to the Mortgage Law, according to which, using mortgage certificates has become more flexible. A mortgage certificate may now be executed at any time during the security period and remain valid after the expiration of the mortgage agreement and the agreement secured by such mortgage. The mortgage certificate may be transferred to a custodian. In this case, the ownership of a mortgage certificate is confirmed by entry into a custodian account. Such account may be opened on a temporary basis or permanently ("mandatory"). The owner of the mortgage certificate should be registered in the register of rights with immovable property on the basis of an excerpt from the custody account.

Pledge of Participatory Interest

Very important amendments relating to the pledge of a participation interest in a limited liability company were also introduced into Federal law No. 14-FZ "On Limited Liability Companies", dated January 14, 1998 and Federal law No. 129-FZ "On the State Registration of Legal Entities and Individual Entrepreneurs", dated August 8, 2001. For more information on these amendments see Significant Changes to Russian Law on Limited Liability Companies Adopted on page 1. /J. Handz, E. Filkina, O. Gorshkolepova, N. Mikheeva

New Rules Clarify Russian Stock Exchange Closings

On February 6, 2009, new rules were introduced regulating Russia's stock exchanges. Russian shareholders and stockbrokers have been patiently waiting for amendments to the "Regulations on the Activities on Equity Market Trade Organization" introduced by Order No. 08-52/ïç-í of the Federal Service for Financial Markets of the Russian Federation ("FSFM"), dated November 13, 2008 (the "Order"), particularly in the current nerve-wracking market climate.

The Order contains the following key amendments:

- a definition of the stock index to be used for market suspension and its characteristics (the information on the current stock index must be displayed within 2 minutes after its calculation on the stock exchange's website);

- the methodology for calculating current securities prices for purposes of determining if market suspension is necessary; this methodology will be established by the founder of the stock exchange in its trading rules and displayed on its website;
- substantial changes were made to share trading procedures; the most important ones relate to the trade organizer's obligation to terminate or suspend stock exchange trading and the procedure for such suspension or termination in respect of transactions between intermediaries and clearing houses (so-called "addressless transactions"). Operations will be suspended for one hour if the stock index changes by more than 15% or will be suspended until the end of the day in the event of a 25% change in the stock index. Suspension of trading in specific shares can only occur with respect to securities quoted on the "A" list or which are used in the calculation of the stock index. Such suspension should last for one hour if a share price change by more than 20% and the trading will be suspended until the end of the day in the event of a 30% deviation in share prices. The FSFM also acquired the right to provide for additional grounds to suspend or terminate trade; the requirements for disclosure of information to the FSFN in the event of trading suspension and termination have also been clarified;
- the procedure for calculation opening, closing and current prices used for purposes of trading suspension was changed;
- securities can be included into a "B" list for a term of up to 1 year (previously, it was 6 months); and
- the FSFM has strengthened the disclosure requirements as part of the system to monitor and control stock exchange requests and transactions (including installation of a remote terminal to display relevant information in "real time").

The amendments are aimed at making stock exchange activities more transparent and in particular at clarifying the procedures for suspending and terminating trading. Some amendments concerning listing and delisting securities (for instance, rules relating to the listing of an issuer's securities created as a result of the reorganization of a legal entity). The FSFM has called for bringing the existing stock exchanges rules into compliance with the new requirements for trading suspension. These rules will be filed with the FSFM by February 15, 2009, and come into effect from March 1, 2009.

The Order has also amended the Regulations on the criteria for the liquidity of securities approved by the FSFM Order No. 06-25/їç-í, dated March 7, 2006. The amendments incorporated relate to the exclusion of securities from the list of liquid securities. According to the changes, if prior to the date of compilation of this list: (i) the securities' term of circulation has expired, (ii) the securities are paid off (annulled) (including because of reorganization or liquidation of the legal entity), or (iii) a stock exchange has received information that this would happen during the relevant quarter for compiling the list of liquid securities, the affected securities will not be included in the list. After receiving such information, the stock exchange may (or will, if the relevant event should happen within the current quarter) exclude the relevant securities from the list, and this information will be displayed on the website of the stock exchange. According to the amendments, if securities used as collateral for loans provided under margin transactions are excluded from the list of liquid securities, they may continue to be deemed security for 5 business days after display of information of exclusion on the website of the stock exchange./E. Filkina

Recent Developments on Restoring Rights to Joint-Stock Company Shares in Russian Courts

The RF Supreme Arbitrazh Court has been reviewing court practices to establish a new judicial mechanism for restoring owner's rights to shares.

In practice, shareholders of joint stock companies in Russia frequently lose ownership to their shares under various circumstances (e.g. due to an invalid transaction, theft or fraud). However, restoring the rights of a person who has lost ownership to his or her shares is a difficult, and often impossible, task.

In Russia, shares in joint-stock companies are issued in non-documentary form. The rights of the owners to non-documentary shares must be certified in a share register or, in circumstances where the securities are held by a depositary, by a corresponding record in a special depo account of the depositary. In addition, such shares, as a

class of securities,[1] are recognized as a type of *veshi* (literally "things").[2] This approach results in the existence of ownership rights (or *quasi* ownership rights) over shares.

Non-documentary shares are easily transferable. As a result, in a dispute, often by the time court proceedings are initiated, the shares in question have long since been transferred to a third party and/or co-mingled with shares acquired under other transactions. Thus, it may be difficult to find the exact shares in dispute and the current owner of such shares.

Established court practice indicates that claims for restitution and replevin (in Russian law replevin is referred to as *vindikatsiony* -- literally "vindication") can be used to restore a claimant's rights to non-documentary shares.[3] However, this possibility is remote as explained below.

Restitution

Restitution has a specific sphere of application; it can be applied only where a transaction is invalid, irrespective of the basis for a transaction being recognized as invalid. If a transaction is invalid, each party must return to the other party everything that has been received under such transaction (*see* Sections 1 and 2 of Article 167 of the RF Civil Code).

Since the concept of restitution is inextricably connected to the concept of an invalid transaction, for the remedy of restitution to be successfully pursued by a claimant, three requirements must be met: first, there should be a transaction; second, such transaction should be invalid; and finally, the property to be restored must be specifically identified. In addition, restitution can be used only to invalidate the initial transaction and not subsequent transactions.[4]

Among other requirements, a restitution claim must include a specific list of property to be returned. Based upon current court practice,[5] this is a mandatory requirement since the court must set out in its judgment exactly what the parties received under the agreement and what kind of property must be returned to each party.

In the context of non-documentary shares, the exact shares in dispute cannot be identified if, for instance, the defendant has shares of the same type and of the same issue in the same joint-stock company which it acquired separately. Legal scholars presume that in such circumstances the same (i.e. identical) shares must be returned.

However, in practice, since non-documentary shares are so easily transferred, in most court judgments, the court dismissed restitution claims for shares (issuing only a judgment invalidating the transactions) because the party that had initially acquired the shares under the invalid transaction can no longer be shown to hold them.[6]

Replevin

A claim of replevin is an owner's claim for the return of his property from another's unlawful possession (*see* Article 302 of the RF Civil Code). A claimant in a replevin claim must be the owner and prove that he has the right of ownership over the property to be returned. The defendant in a replevin claim must be someone who unlawfully holds the property on the date the replevin claim is submitted.

A replevin claim can be filed when the property in dispute leaves the owner's possession against his will (e.g. if the property was stolen). As established by the RF Supreme Arbitrazh Court in its recent "Review of the court practice

[1] *See* Article 143 of the RF Civil Code.

[2] *See* Article 128 of the RF Civil Code.

[3] As described in this article, each of these claims has its own specific application, meaning that both claims cannot be brought in the same circumstances or even simultaneously.

[4] This approach was confirmed by the RF Constitutional Court in its Resolution No. 6-P "On the Case for the Examination of Provisions of Sections 1 and 2 of Article 167 of the RF Civil Code in respect of their correspondence to the RF Constitution in connection with Complaints of Individuals O.M. Marinicheva, A.N. Nemirovskaya, Z. A. Sklyanova, R.M. Sklyanova and V.M. Shiryaev", dated 21 April 2003. Examples of cases in Arbitrazh courts in this respect are voluminous. See, e.g., Ruling of the Presidium of the RF Supreme Arbitrazh Court No. 9341/05, dated 6 December 2005.

[5] *See*, e.g., Resolution of the Federal Arbitrazh Court for the Moscow district, dated 1 November 1999, on case No. KG-A40/3526-99; or Resolution No. 1720/02 of the Presidium of the RF Supreme Arbitration Court, dated 27 August 2002.

[6] *See*, e.g., Resolution of the Federal Arbitrazh Court for the Far-Eastern district on case No. F03-A51/06-1/1728 dated 27 June 2006. According to Section 2 of Article 167 of the RF Civil Code, if it is impossible to return in kind what was received under an invalid transaction (including in cases where what has been received is property usage, work performed or services provided), the value of the same should be reimbursed. However, a claim for replacement of value may not be satisfied by a court on its own initiative; such a claim must be submitted by a claimant during court proceedings to invalidate a transaction and obtain restitution or in separate proceedings subsequently (see Resolution of the Federal Arbitrazh Court for the North-Caucasus district, dated 03 December 2004, on Case No F08-5685/2004). Accordingly, if the claim for the replacement of value of non-documentary shares has not been submitted by the claimant, the court must dismiss the claim for restitution.

on some questions, connecting with the return of property from another's unlawful possession" (*see* Informational letter of the RF Supreme Arbitrazh Court No 126, dated November 13, 2008) "invalidation of the transaction, in the performance of which the property in dispute had been transferred, could not be evidence of the property leaving the owner's possession against his will". In such circumstances, a claim for replevin has no basis.

In principle, a claim for replevin can be filed for shares (issued either in documentary or non-documentary form). This approach was supported by the RF Supreme Arbitrazh Court, which expressly stated in a number of its decisions that replevin of shares is permissible.[7]

However, whether shares issued in non-documentary form might be the subject of a replevin claim has sharply divided opinion in both Russian jurisprudence and the legal academic community.

Setting aside theoretical debates, including whether the legal regime for physical property can be applied to such abstract concepts as non-documentary shares, a considerable amount of evidential complications must be addressed and overcome, which may well be insurmountable and, in turn, will often lead to such claims being dismissed by a Russian court. For instance, in many cases the court could not establish who currently holds the shares in dispute and had to dismiss the claim.[8] As follows from the court practice, this fact is one of the most difficult to establish.[9] A claim for replevin might be possible in some cases; however, the number of successful claims is small. Thus, neither restitution claims, nor claims for replevin can provide a foolproof mechanism for a court to restore a claimant's rights to non-documentary shares.

In court practice, other remedies to restore rights to joint-stock company shares can be found, such as court recognition of an owner's rights to shares, invalidation of incorrect records of transfer of shares in the share register, etc. However, as repeatedly stated by the courts, including the RF Supreme Arbitrazh Court, it is not possible to recognize an owner's rights to shares in dispute without being able to establish who currently holds the shares, and without being able to return the shares to the original owner's possession (i.e., the claimant's possession) and, therefore, cannot be done without considering a claim for replevin.[10] For example, under a hypothetical scenario a joint-stock company might have two shareholders with rights to the same shares, one who has ownership based on the share register and one based on a court decision.[11] Clearly, this situation might cause further disputes.

The same consequences may result if a court grants a claim for invalidation of the recording of a transfer of shares in dispute in the share register. The question of whether the records were executed legally cannot be resolved without determining the current holder of the shares, whether such holder has any legal rights for shares, and whether such shares can be returned to the legal owner. Thus, because the specific mechanism for transferring the rights to share ownership and possession for shares is inseparably linked with the relevant recording in the share register, the first issue cannot be resolved without considering the second.

As was stated by Aleksandra Makovskaya, the judge of the RF Supreme Arbitrazh Court, the RF Supreme Arbitrazh Court is currently reviewing court practice to suggest the application of a new judicial mechanism for restoring owner's rights to shares, literally called "restoration of corporative control".[12] As her description indicates, this would be a complicated means of restoring the owner's rights to shares, which would include the other means broadly used in practice, such as restitution and replevin. The goal of this new mechanism is to restore the owner's

[7] For instance, in Resolution No. 3612/07, dated 12 April 2007, the RF Supreme Arbitrazh Court states: "Arbitrazh courts which consider disputes to recover registered issuable securities from the illegal possession of another person proceed from the possibility of vindication of securities, <u>even if they are issued in non-documentary form</u>; therefore the challenged judicial acts do not violate consistency in interpretation of application by the courts of provisions of Chapter 20 of the RF Civil Code".

[8] In Case No. 1877/06, the Presidium of the RF Supreme Arbitrazh Court in a Resolution, dated 29 August 2006, concluded that the shareholder's claim was in the nature of replevin, remanded the case to the court of first instance for reconsideration. The Presidium instructed the court <u>to establish who holds the shares</u> that previously belonged to the claimant and join these persons to the court proceedings.

[9] In dismissing the cassation appeal of the claimant, the Federal Arbitrazh Court for the Moscow District determined in the Resolution on case No. KG-A40/11390-05-P, dated 2 December 2005, that the courts had already exhausted all their procedural opportunities for establishing the holder/holders of the shares in dispute.

[10] *See* e.g. Resolution No. 3039/07of the Presidium of the RF Supreme Arbitrazh Court, dated September 04, 2007.

[11] *See* e.g. Resolution of the Federal Arbitrazh Court for the Moscow district, dated October 21, 2003 on case No KG-A40/7716-03.

[12] *See* A. A. Makovskaya. "Restoration of corporative control in a system of judicial means for protection of corporative rights". Vestnik of the RF Supreme Arbitrazh Court. No 1/2009.

rights to shares (i.e. corporative control) faster without applying different means step-by-step.

It is still too early to analyze the possible proposals of the RF Supreme Arbitrazh Court and how they would relate to the RF Civil Code (Article 12 of which establishes the list of judicial means for protection of civil rights) and the RF Federal Constitutional Law "On Arbitrazh Courts in the Russian Federation", dated April 28, 1995, No 1-FKZ in respect of the scope of the RF Supreme Arbitrazh Court competence. It is hoped that such a mechanism would make restoration of an owner's rights to shares in joint-stock company more feasible in practice. /M. Rozenberg, Y. Pavlovich

New Audit Law Loosens Some and Tightens Other Requirements for Auditors

On December 30, 2008 Federal Law No. 307-FZ "On Audit Activity" was passed (the "Audit Law"). Under the Audit Law, audit companies and individual auditors cannot be engaged in any activity except audit activities and activities related to audit which are specified in the Audit Law and federal auditing standards (e.g. tax consulting; management consulting; bookkeeping; analysis of financial and economic activities; legal advise; valuation activities; etc.).

The new Audit Law abolishes the existing procedure for licensing audit activity. In particular, valid audit licenses, audit licenses which expire in 2009 and audit licenses issued in 2009 will be effective only until January 1, 2010. Audit companies and individual auditors who do not become members of self-regulating companies by that date will not be entitled to provide audit services.

The Audit Law sets forth specific requirements with respect to audit companies and individual auditors, the most important of which are as follows:

(i) an audit company should be a commercial company, which is a member of one of the self-regulating companies. Such commercial company can be established in any corporate form except for an open joint stock company and a state or municipal unitary enterprise[1];

(ii) the total number of employees who are certified auditors should be at least three (instead of five as previously required);

(iii) at least 51% of the charter capital is to be held by individuals who are certified auditors and/or audit companies;

(iv) a sole executive body should be a certified auditor;

(v) at least 50% of the executive board members of an audit company should be certified auditors;

(vi) a management company (if applicable) should be an audit organization;

(vii) an individual auditor should be a member of one of the self-regulating companies and have a qualification certificate, which entitles him or her to conduct audits in any sector of the economy. In order to receive the certificate, an individual auditor should pass the qualification exam and have at least three years of work experience related to audit activities (two of three years of them in an audit company). The introduction of a qualification exam will in fact provide a unified approach to determining an auditor's professional level, which assures equal rights and opportunities for those who wish to become an auditor. In addition, the Audit Law provides certain circumstances under which the qualification certificate may be cancelled (e.g., lack of participation in audit activities for two consecutive years; systematic violations of the Audit Law and federal auditing standards; etc.).[2]

Under the Audit Law, audit companies and individual auditors are obliged to exercise internal and external quality control. The principles of internal and external quality control are set out in the Audit Law, federal auditing standards, rules on the independence of auditors, and the auditors' code of professional ethics. External quality control is performed by self-regulating

[1] An audit company is entitled to provide audit services only after the date it is listed in the Auditors Register of one of the self-regulating companies.

[2] New rules relating to qualification certificates are effective from January 1, 2011. Until that date, individual auditors will provide audit services based on the certificates issued previously.

companies with respect to its members and by an authorized federal body.[3]

Government regulation of audit activities is carried out by the RF Ministry of Finance. There is also an Audit Activities Board which is a department of the RF Ministry of Finance and is established to protect the public interest. The composition and the number of members of the Audit Activities Board should be approved by the authorized federal body.

The Audit Law requires that audit companies and individual auditors be a member of a self-regulating company. Under Federal Law No. 315-FZ "On Self-Regulating Companies", dated December 1, 2007 (the "Law on SRC"), a self-regulating company is a noncommercial organization uniting businesses based on their participation in the same kind of activities. Audit companies and individual auditors could be members of only one self-regulating company. A noncommercial organization can be listed in the State Register of Self-Regulating Companies kept by the authorized federal body if it complies with the following conditions:

(i) at least 700 individual auditors or 500 audit companies should be members of such noncommercial company;

(ii) approved rules for performing external quality control and an auditors' code of professional ethics should exist;

(iii) an indemnification fund should exist which will secure additional property responsibility of each member of the self-regulating company. The Law on SRC establishes a minimum payment of 3,000 RUB to the indemnification fund from each member of the self-regulating company. It appears that self-regulating companies are entitled to establish a higher rate of contribution to the indemnification fund.

A self-regulating company is entitled to establish additional requirements for its members (individual auditors and audit companies), additional responsibility for conducting audit activities and additional penalties for violation of the Audit Law, auditing standards, rules on the independence of auditors, and the auditors' code of professional ethics.

[3] New rules relating to the Audit Activities Board are effective from January 1, 2010.

A self-regulating company is responsible for keeping a Register of its members, which is a systematized list of individual auditors and audit companies. The master copy of the Register is a code of all Registers of all self-regulating companies which is kept by the authorized federal body. Self-regulating companies should publish Registers of their members (individual auditors and audit companies) on the official Internet web-sites by February 1, 2010. The master copy of the Register should be published by the authorized federal body on its official Internet web-site before March 1, 2010. /A. Kulterbaeva

Russian Federation Government Establishes Additional Measures to Support High-Priority Infrastructure Projects

The credit crunch is currently seriously affecting the Russian economy, forcing the RF Government to reconsider its development plans for certain industry sectors. There is a pressing need to upgrade infrastructure facilities around the country. Exhibiting optimism, RF Prime-Minister, Vladimir Putin, announced that, regardless of the global financial crisis, the RF Government feels confident about its ability to realize all of the proposed infrastructure projects. However, Mr. Putin suggested that major Russian companies and banks need to support private investors to complete important infrastructure projects. Mr. Putin proposed that companies be allowed to issue infrastructure bonds guaranteed by the state and by state bank Vnesheconombank ("VEB") to fund key construction projects.

In December 2008, the RF Government approved the Strategy For Development of the Russian Financial Market up to 2020[1] (the "Strategy") which declares that, in order to encourage additional investment into long-term infrastructure projects based on public-private partnership, it is necessary to establish certain measures for private investors to invest in infrastructure bonds. Bondholders may secure their obligations by pledging their rights over

[1] Order No. 2043-p, dated December 29, 2008

assets which should be constructed under certain infrastructure projects. As another option, such bondholders may pay a fee to state authorities/banks for the use of such assets. The Strategy also requires amending Russian laws to protect bondholders' rights. According to the Strategy, all necessary amendments to the Russian legislation should be made by September 2009.

The RF Federal Service for Securities Markets issued an Order On Amendment of the Regulation On Management of Securities Market Trade (which still is not available on public sources but registered with the Ministry of Justice). The Order apparently establishes additional cases when infrastructure bonds may be included in the quotation list without meeting the general requirements prescribed by the Regulation. These would include: i) bonds secured by an RF state guarantee and/or suretyship or a VEB guarantee; and (ii) bonds issued by concessionaires. According to the Deputy Head of the RF Federal Service for Securities Markets, Mr. Alexander Sinenko, the issuance of infrastructure bonds would help to combine current demands to invest in infrastructure projects.

These amendments will help to circumvent the prohibition on using pension funds for infrastructure bonds. The previous version of the Regulation did not allow pension funds to be included in the quotation list "A1". Now, it is apparently possible if certain requirements are met, such as 1) the issuer is a winner of a concession tender; 2) the purpose of repayment is the realization of a concession agreement; and 3) the issuer publishes its accounts under international accounting standards.

However, the RF Government must amend the RF Law on Concessions as currently there is a direct prohibition on pledging the rights of a concessionaire over the underlying assets. Additionally, certain amendments to the RF Law on Joint Stock Companies are also required as it prohibits pledging rights under bonds, except for securities and real estate.

Currently, according to Kommersant, Gazprom, Rosneft and several Russian energy and metals companies are preparing to issue infrastructure bonds to raise 500 billion rubles in the first quarter of 2009. Russian Railways plans to issue RUB 100 billion (approx. USD 3.64 billion) worth of infrastructure bonds according to Kommersant. The money will apparently be used to finance the construction of new railroads to link seaports to the network, for instance Ust-Luga, Taman, Novorossiysk, Murmansk etc. /A. Gasparyan

UKRAINE

(Continued from page 1)

Ukraine Considers Amending Import Duty Regime

On January 15, 2009, the Ukrainian Parliament overturned a presidential veto on the Law of Ukraine No. 3430 "On Amendments to Certain Legislative Acts of Ukraine Concerning Minimization of Global Crisis' Impact on Development of National Industry" (the "Import Duty and VAT Exemption Law" or "IDVE Law").

The Import Duty and VAT Exemption Law, which is expected to come into force in February 2009 (on the eleventh calendar day after the official publication of the IDVE Law following its execution by the Ukrainian President), stipulates that certain goods that are imported into Ukraine for the purposes of establishing new businesses which use energy-saving technologies should temporarily be VAT and import duty exempt. Such exemption is scheduled to expire on January 1, 2011. The applicable goods are principally energy-saving devices that are not currently manufactured in Ukraine: equipment for certain technology items (groups 84, 85 and 90 of the Ukrainian Classifier of Goods for Foreign Economic Activity (UKTZED)), key assets, materials, and their spare parts (except for excisable items). Such goods may also be contributed into the statutory capital of relevant Ukrainian companies.

In addition, on February 4, 2009, the Ukrainian Parliament approved draft law No. 3379 "On Amendments to Certain Legislative Acts of Ukraine Intended to Improve the Payment Balance of Ukraine Due to the World Financial Crisis" (the "Draft Additional Import Duty Law" or "DAID Law") following the recommendations of the Ukrainian President in connection with a previous draft of the DAID Law. The DAID Law, if adopted,[1] would for a limited period of time impose increased import duties (*i.e.*, an additional import duty on an existing import duty rate) on certain goods imported into Ukraine. The proposed list of relevant goods is likely to

[1] In accordance with Article 94 of the Ukrainian Constitution, the Ukrainian President is obliged, by February 19, 2008, either to sign the DAID Law into force or make his further recommendations (if any).

include cars, wine, meat and poultry, clothes and shoes (with the final list of relevant goods to be approved subsequently by the Ukrainian Parliament). The DAID Law stipulates that the increase in import duties be applicable for an initial term of up to 6 months with a potential further 6-month extension. Thus, for example, the import duty applicable to cars would increase from 10% to 23%, of which 13% would be a temporary additional duty rate.

It is currently expected that the Ukrainian President will sign the DAID Law into force thereby increasing the applicable import duty for the relevant goods from 10% to 23% for a 6-12 month period starting some time in February/March 2009. /J. Dakin, N. Kim

To REACH or Not To REACH: Question to Ukrainian Exporters to the EU

Ukrainian exports to the European Union (EU) mainly comprise steel and chemical products. These products have been affected by the new registration requirements of an EU regulation known as REACH.[1] In this article, we examine how the REACH registration requirements may act as a potential impediment to the exports of steel and chemicals from Ukraine to the EU.

REACH requires that chemical substances on their own, in preparations and those which are intentionally released from articles must be registered with the European Chemicals Agency (ECHA). The regulation applies to substances manufactured in, or imported into the EU in annual quantities of 1 ton or more per company. The substances currently on the EU market which meet the definition of phase-in substances[2] should have been pre-registered between 1 June and 1 December 2008.

Provided that the company has pre-registered it receives its own pre-registration number and can continue to supply the European Union market as before. The full registration process then starts, to be completed on a sliding scale depending on the volume supplied by each registrant: those importing >1000 tonnes per annum must register those substances by 30 November 2010, those importing >100 tonnes must register those substances per annum by 31 May 2013, and those importing >1 tonne must register those substances per annum by 31 May 2018.

The full registration involves all of the manufacturers and importers of a substance forming a consortium known as a Substance Information Exchange Forum (SIEF) where it will be mandatory to share certain results of each company's investigations and agree cost sharing mechanisms. The potential registrants will then work together in their relevant SIEFs to prepare their respective chemical safety reports and registration dossiers.

Although, we understand that the vast majority of Ukrainian importers of steel and chemicals into the EU have pre-registered by the 1 December 2008 deadline, a failure to have pre-registered would enable the EU to prohibit imports of substances from such importer . Any such prohibition would apply until such importer had registered all of its chemical substances with the ECHA.

However, there is still an opportunity for an importer to benefit from the extended registration deadlines for phase-in substances even though it did not pre-register by the 1 December 2008 deadline for pre-registration. According to Article 28 (6) of the REACH Regulation, first-time manufacturers or importers must pre-register within six months of their first manufacture or import of a particular substance over a threshold of one tonne, and not later than 12 months before the relevant deadline for registration: such first-time manufacturers or importers should submit their pre-registration before 1 December 2009, 1 June 2012 or 1 June 2017 (in accordance with the tonnage thresholds stated above).

If an Ukrainian exporter needs to establish whether it must register a substance, it is advised first to prepare a database of the substances used in its articles, calculate the weight of the substances in their exported products to determine whether any tonnage thresholds are reached and then to check on the ECHA's homepage http://echa.europa.eu whether the substance has already been pre-registered.

A Ukrainian exporter may also wish to appoint a

[1] Regulation (EC) No 1907/2006 Of The European Parliament And Of The Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals.

[2] Phase-in substances are, essentially, those that are listed in the European Inventory of Existing commercial Chemical Substances (EINECS).

representative (known as an "only representative"[3]) and approach ECHA with further clarifications on its registration. Finally, Ukrainian exporters should comply with the registration requirements for a given substance and complete a technical dossier and chemical safety report. It should be noted that if a Ukrainian exporter fails to register a substance, it may be prohibited from importing this substance (in an article or preparation) into the EU. Thus, Ukrainian companies that import substances into the EU should seek professional legal advice if they believe that their products fall under the scope of REACH. /J. Dakin, V. Dovhan

[3]According to Article 8 (1) of the REACH Regulation, a legal or natural person that manufactures a substances (to be used on its own, in preparations and/or to produce articles), formulates preparations or, if the substance in their articles are required to be registered, produces articles, outside of the EU can appoint an only representative located within the EU to carry out the required registration of their substances that are imported into the EU.

KAZAKHSTAN

(Continued from page 1)

Kazakhstan Passes New Competition Law to Respond to Market Changes

government intends to improve conditions for the development of small and medium size businesses, as well as to enable the growth of domestic production. The Competition Law integrates and develops the provisions of two earlier Kazakhstan laws – "On Unfair Competition" and "On Competition and Limitation of Monopolistic Activity" – and applies directly, thereby replacing the cumbersome regulations which previously addressed the procedural aspects of market supervision. The primary aims of the Competition Law are to create improved conditions for the growth of entrepreneurial activity, to de-monopolize sectors of the economy prone to economic concentration, to ensure free competition, and to protect the rights of consumers.

The principal changes introduced by the Competition Law include:

- extraterritoriality: the regulator is empowered to act against Kazakhstan market participants if transactions outside of Kazakhstan might affect Kazakhstan market participants or might restrict competition in Kazakhstan;
- greater certainty: a definition of "unfair competition" has been included for the first time, providing a detailed list of what will constitute unfair competition;
- flexibility: market participants that take steps to remedy harm caused due to a violation of the law may be exempted from criminal liability by order of a court ;
- mutuality: the Competition Law recognizes and regulates for the first time the power of a sole buyer or consumer in a given commodity market; and
- greater simplicity: approval is no longer required for an economic concentration within a corporate group.

The Competition Law allows market participants to act in concert, "unless such actions derogate from a consumer's legal rights", and so long as any such actions satisfy the other criteria envisaged in the Competition Law. The exemption is available where the aggregate market share of the relevant market participants does not exceed 15% or where the concerted activities are intended to further government policy, i.e., developing small and medium-sized business, developing standardized practices, or improving production by implementing resource saving technologies.

Ambiguity in the previous law regarding the right of the antimonopoly authority to conduct compliance inspections has been resolved. The previous law could be interpreted as permitting the antimonopoly body to conduct scheduled and unscheduled inspections of market participants to determine compliance with the legislation. Under the new law, an allegation of a violation must now have been made in accordance with grounds specified in the law before the antimonopoly body is entitled to conduct an investigation.

For the first time, the provision of government aid to certain market participants will be regulated by the antimonopoly authority. Where government aid has been provided without prior antimonopoly approval, the decision to provide such aid which then results in restriction or elimination of competition may be invalidated by court order. Government aid may also be recalled in the event of misuse, and the recipient required to reimburse expenses incurred by the government in granting the aid.

Participation in the economy by the state is to be limited under the Competition Law and only for the purpose of meeting identifiable socioeconomic needs. If the state's share in a newly established company exceeds 50%, the formation of the company will be regulated by the antimonopoly authority and will require prior approval. In addition, legal entities and their affiliates with greater than 50% state participation, established prior to enactment of the Competition Law, will be required within three years of enactment of the new law to obtain the consent of the antimonopoly authority to continue their operations (other than certain specified exceptions). Similarly, existing state companies will need to obtain approval within two years to remain in operation.

Perhaps of most immediate interest to foreign investors, the threshold for an economic concentration requiring approval has been raised. Under the Competition Law, consent is required if, among other things, the book value of the assets of entities taking part in the transaction or their aggregate volume of sales for the last financial year exceeds approximately US$17 million at the current exchange rate, which represents a level approximately one and a half times the previous threshold. However, applicants are now required to submit a production/sales forecast (or equivalent information) in addition to the existing list of documents required to apply for the approval. The term during which the antimonopoly authority may consider an application has been increased from 30 to 50 days. /A. Aubakirova, S. Nurgaziyeva

Regulation of Kazakhstan's Securities Market Overhauled

The end of 2008 saw a series of significant changes to Kazakhstan legislation, from subsoil use to the tax code and anti-monopoly legislation. Regulation of the securities market was overhauled as well. This article describes in brief those amendments likely to be of interest to investors and potential investors in Kazakhstan securities.

Civil Code

The concepts of a financial instrument and a derivative financial instrument were included in the Civil Code for the first time, and legal definitions were given to those terms, along with the definitions of financial asset, financial obligation, and equity instruments. The definitions are rather broad, but it is nonetheless hoped that the introduction of these definitions into the Civil Code will give the relevant transactions proper recognition under law and eliminate any doubts concerning the enforceability of the rights of the parties arising from such transactions. Financial instruments are defined as money, securities (including derivative securities) and transactions with financial instruments which result in one entity obtaining a financial asset and another entity obtaining a financial obligation or an equity instrument. Derivative financial instruments are defined as agreements (i) the price of which depends on the value (including the fluctuation of value) of the underlying asset of such agreement; and (ii) which provide that the settlement under such agreements will be made in the future. The derivative financial instruments include options, futures, forwards, swaps and other financial instruments which meet the relevant criteria, including those which constitute a combination of the listed financial instruments.

Taxation of Securities Transactions

The new Tax Code provides for a more favorable taxation regime for transactions involving securities. For instance, Kazakhstan income tax no longer applies to the following types of capital gains:

- capital gains from the sale of shares in a legal entity, provided that at least 50% of the value of the charter (share) capital or shares of such legal entity as of the date of the sale do not constitute the assets of entities that are subsoil users;
- capital gains from the sale of securities by open trading on a stock exchange functioning in the Republic of Kazakhstan (and/or a foreign stock exchange, with respect to gains received by a non-resident without a permanent establishment in Kazakhstan), provided that such securities are on the official list of the stock exchange on the date of sale; and
- capital gains from the sale of state securities and agency bonds.

Interest on state securities and agency bonds is also not

subject to Kazakhstan taxation. Dividends and interest on securities included in the official list of a Kazakhstan stock exchange as of the date of accrual of such dividends or interest are not taxable for individuals and foreign legal entities that do not have a permanent establishment in Kazakhstan.

In addition, Kazakhstan corporate income tax does not apply to the following types of income received by legal entities and foreign legal entities operating in Kazakhstan through a permanent establishment:

(i) dividends, except for dividends payable by closed high-risk investment funds and high-risk investment funds in the form of joint stock companies;

(ii) income of a special financial entity from assignments of receivables under a securitization carried out in accordance with Kazakhstan securitization laws; and

(iii) interest on debt securities included in the official list of a Kazakhstan stock exchange as of the date from which such interest is accrued.

The following types of income of non-residents that do not have a permanent establishment in Kazakhstan are not subject to Kazakhstan withholding tax:

(i) dividends, provided that the following conditions are satisfied:

(a) the shares are held for more than three years;

(b) at least 50% of the value of the charter (share) capital or shares in a legal entity as of the date of the dividend payment is composed of the assets of entities which are not subsoil users; and

(ii) capital gains on units in open investment funds, following a buy-out by a management company.

In addition, a more detailed treatment of income from transactions with derivative instruments was introduced in the new Tax Code. Income under swap transactions is defined as any excess of receivables (payments received) over expenditure in the reporting period in question. The new Tax Code also provides that the losses from sales of securities and under derivatives may be offset against income from securities and derivatives respectively, and if such losses cannot be offset in the same tax period, they may be carried forward for up to ten years.

Securities Market Law

The most significant change to securities market regulation is the expansion of the definition of a Kazakhstan resident for the purposes of an issuance and initial offering of securities in a foreign state. "Kazakhstan residents" now include, in addition to Kazakhstan legal entities and legal entities whose effective management is located in Kazakhstan, those legal entities **where at least two thirds of their assets are located in Kazakhstan or at least two thirds of their assets are issued in accordance with Kazakhstan legislation**. This extended definition is important because of the permit regime and the requirements to offer securities in the domestic market, which applies to residents seeking to carry out an initial sale of securities in a foreign state. Residents may issue bonds and derivatives (depositary receipts) in accordance with the laws of a foreign state only with a permit from the Kazakhstan regulator.

In addition, the Kazakhstan regulator now will recognize transactions on the stock exchange as concluded with the aim of price manipulation on the basis of an opinion given by a committee of the board of directors of the stock exchange, and the stock exchange is required to create a committee of the board of directors for this purpose and monitor the transactions which meet the criteria established by the Securities Market Law.

Rules for Brokers and Dealers

Certain important amendments have also been made to the Rules for Brokers and Dealers Activity in the Securities Market of the Republic of Kazakhstan. Brokers and dealers are now required to publish their financial reports on a quarterly basis in both the Russian and Kazakh languages in the mass media and/or on their web-sites. New articles have also been added concerning repo transactions. Repo agreements carried out by a broker and/or dealer in the trading system of a stock exchange must now be executed for a period of not more than ninety calendar days, taking into account any extensions to the initial term of the repo transaction. The minimum value of the client's assets recorded in a broker/dealer's accounts must be maintained

at the level of at least 30% of the value of all repo opening transactions executed by the broker/dealer in the system of a stock exchange by direct trading, based on the order of the client, without taking into account any margin limits relevant to margin transactions. The broker/dealer may not enter into a transaction if the required number of securities is not available in the account of the broker/dealer or that of its client who gave the order to enter into the transaction. /Y. Pestereva

Kazakhstan Parliament Reviews New Subsoil Law

The proposed Subsoil Law was first publicized by the Kazakhstan Ministry of Energy and Mineral Resources (MEMR) in July 2008 and submitted to the Parliament several months later following extensive debate among industry members, government officials and legal practitioners. The Kazakhstan Minister of Energy and Mineral Resources recently presented the draft to the members of the Kazakhstan Parliament. Once adopted, the proposed law will replace both the existing Subsoil Law and the Petroleum Law.

One of the most controversial provisions of the proposed law is the limited stabilization of subsoil use contracts. In particular, fiscal terms will be excluded from the stabilized terms and conditions of subsoil use contracts. This is consistent with the general trend established by changes to Kazakhstan's fiscal legislation in the past few years, culminating in the enactment of the new Tax Code earlier this year. Under the new Tax Code, calculations of taxes and other fiscal payments due in respect of activities under subsoil use contracts must be made in accordance with the law in effect on the date on which the relevant payment liability arises, rather than in accordance with the terms and conditions of the respective contracts. The Tax Code provides for stabilization of fiscal regimes only in respect of the following types of subsoil use contracts: (i) production sharing agreements (PSAs) entered into prior to January 1, 2009, and (ii) subsoil use contracts specifically approved by the Kazakhstan President. Although some of the largest properties in Kazakhstan are covered by PSAs, the total number is relatively small in comparison to other types of subsoil use contacts. Notably, Kazakhstan has no plans to enter into new PSAs: the PSA Law was abolished on January 1, 2009 and the proposed Subsoil Law bans any new PSAs. Moreover, it is generally understood that only one subsoil use contract has been approved by the President. It therefore appears that fiscal stabilization will eventually be eliminated from most subsoil use contracts in Kazakhstan.

Other notable changes proposed in the Subsoil Law include various provisions concerning the Government's pre-emptive right to acquire interests in subsoil projects and MEMR's consent to the transfer of interest in such projects. The proposed law maintains the existing pre-emptive right of the state to acquire direct or indirect interests in a subsoil user and the requirement to obtain MEMR's consent to transfers of subsoil use rights or interests in a subsoil user, including transfers by succession. The novelty proposed in the draft law is that the pre-emptive right and the consent requirements would not apply to the following transfers:

(i) alienation of shares or derivatives of a subsoil user that is a listed company;

(ii) transfer of subsoil use rights by a subsoil user, or transfer of an interest in a subsoil user, to a wholly owned subsidiary; and

(iii) transfer of a subsoil use right by a subsoil user, or an interest in a subsoil user, between "hundred percent affiliates", which are defined as companies that are wholly owned, whether directly or indirectly, by the same person.

The proposed law will give the Kazakhstan government a greater degree of control over subsoil users. However, it is as yet too early to judge what will be the full impact. Significant changes to proposed subsoil legislation have been put forward 'at the last minute' in the past to counter perceived shifts in Kazakhstan's strategic interests due to commercial realities. It remains to be seen whether any such circumstances will arise on this occasion before the final form of the new Subsoil Law is enacted./V. Mokrousov

RECENT C&P DEVELOPMENTS

Chadbourne Appoints Counsel in Kyiv, Two International Partners in Almaty

January 21, 2009 / Chadbourne & Parke LLP announced today the appointments of Olena V. Repkina in Kyiv as counsel and the appointments of Victor Mokrousov and Sergei Vataev as international partners in Almaty.

"These lawyers have demonstrated skill and creativity in serving the needs of our clients," said Chadbourne's Managing Partner Charles K. O'Neill. "We are pleased to recognize the abilities of these outstanding lawyers. They reflect the broad expertise and geographic presence of Chadbourne and are helping to maintain the Firm's growth in their practice areas. We congratulate them on their new roles and responsibilities."

Ms. Repkina, 28, joined the Firm in 2007 and advises clients on matters regarding mergers and acquisitions, corporate law, banking and finance, securities, employment and intellectual property in Ukraine. She was named in Ukrainian Lawyers - Client's Choice as one of the top 10 young and talented Ukrainian lawyers, and was mentioned in and interviewed for the directory's corporate and mergers and acquisitions section. Ms. Repkina graduated from the Law Faculty of Taras Shevchenko National University of Kyiv where she earned a master's degree (with honors) in 2003.

Mr. Mokrousov, 36, is active in the corporate, finance, mergers and acquisitions, energy, oil and gas practices in Kazakhstan. He joined the Firm in 2005 and since then has been featured among the recommended lawyers for Kazakhstan in the Chambers Global - Guide to the World's Leading Lawyers. Mr. Mokrousov received a law degree (with honors) in 1995 from Kazakh State National University, and earned an LL.M. in 1999 from the University of Minnesota Law School.

Mr. Vataev's practice concentrates on litigation and arbitration, corporate law and project finance matters in Kazakhstan. Joining the Firm in 2005, he has substantial experience in dispute resolution. During the past 10 years, he has advised and represented a large number of major oil and gas companies and other businesses in contractual and regulatory litigations and arbitrations. Mr. Vataev, 41, received a law degree in 1992 from Kazakh State National University, and earned an LL.M. in 2001 from the University of Virginia School of Law.

Chadbourne & Parke Assists Wizz Air on Expanding its Flight Operations in Ukraine

January 16, 2009 / Chadbourne & Parke LLP acted as legal counsel to Wizz Air Ukraine, member of the largest Central and Eastern European based low-cost airline group, on doubling its fleet size in Ukraine. The new Airbus A320-200 aircraft was successfully delivered to Ukraine. This transaction was led by Managing Partner Jaroslawa Johnson and senior associate John Dakin, assisted by senior associate Anna Iakubenko and associate Andriy Kirmach.

Chadbourne's Kyiv office is well versed in representing Wizz Air Ukraine, and worked on setting up its flight operations in Ukraine in early 2008. The Kyiv office has extensive experience in dealing with regulators and state authorities in the air carriage industry.

AT THE PODIUM

December 15, 2008: State Duma Transport Committee Parliamentary Hearings, Moscow

St. Petersburg Counsel Irina Skidan gave a presentation titled "Provisions of the Federal Law on Concession Agreements that Impede the Financing of Infrastructure Projects – Key Deficiencies and Possible Solutions Based on Foreign Experience" by invitation at the State Duma Transport Committee parliamentary hearings. The presentation recommended eliminating the current restriction prohibiting concessionaires from pledging their rights under the concession and related lease agreement as security for financings and extending the period for assigning rights under the concession and related lease agreements to the construction phase.

February 9-13, 2009: CIS Metals & Precious Metals Summit, Moscow

Partners Laura Brank, Shane DeBeer and Konstantin Konstantinov will speak on various topics affecting the CIS metals market, such as accessing international metals markets, addressing issues arising from the new Russian

strategic sectors law, financing metals companies during the global economic crisis and consolidation of the Russian metals sector . Please let us know if you would like a copy of any of the presentations.

For more information about this event, please visit the organizer's website: www.adamsmithconferences.com.

February 17-19, 2009: Russian Alternative Investment Forum, London

Partners Laura Brank and Shane DeBeer and Senior Associate Olga Watson will lead a pre-conference seminar titled Legal Issues Affecting Acquisition Financing in Russia. They will speak on topics including "Recent Developments in the Legal Framework Related to Secured Finance and Protection of Creditors," "Challenges of Acquisition Finance in Russia," and "Acquiring Distressed Companies". Please let us know if you would like a copy of the presentation.

For more information about this event, please visit: www.adamsmithconferences.com.

February 26, 2009: U.S.-Russia Business Council (USRBC) Legal Conference, "Russia: From Legal Nihilism to Rule of Law", Philadelphia, PA, USA

Head of the Russia and CIS Practice, Laura Brank, will join prominent legal practitioners for an in-depth look at the modern-day Russian legal environment. Topics include: the legal system and litigation in Russia, establishing business operations in Russia, anticorruption legislation, intellectual property rights, shareholder rights, regulatory law and legal issues concerning the economic crisis.

For more information about this event, please visit: www.usrbc.org.

CIS LEGAL NEWSWIRE

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