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RUSSIA

The United States Is Missing Out on the Russian Evolution

In July, world attention focused on Russia, as the Group of Eight summit convened in St. Petersburg. Russia was invited to join the G8 in 1998 both to recognize and to encourage its transformation to a market-based democracy. It's been 16 years since the Russian Federation formally declared its independence from the Soviet Union. In that time, a series of remarkable transformations have occurred, yet perceptions of Russia in America – from government, media and, not least, business – have not kept pace with reality.

Having spent more than a decade living and working in Russia, I am amazed at how Americans still misunderstand the situation on the ground here. Perhaps they're blinded by Cold War prejudices or simply prone to outdated visions of Russia as the Wild East. The truth is that Russia is open for foreign investment and American businesses are missing out on tremendous opportunities.

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UKRAINE

Improvement in Securities Regulations Benefits Non-residents

Non-residents may now be listed directly on the issuer's register of shareholders, thanks to the June 14, 2006 Decision of the State Committee on Securities and Stock Exchange (the "Securities Decision"). The Securities Decision eliminates the prohibition under which a non-resident previously had to retain a custodian to act on his behalf as a nominee shareholder. The custodian's name appeared in the issuing company's shareholders' register. This two-tier

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KAZAKHSTAN

New Antimonopoly Law Establishes New Criteria for Consents

Mergers and acquisitions in Kazakhstan are now subject to the new Law "On Competition and Restriction of Monopolistic Activities" (the "New Antimonopoly Law"), adopted on July 7, 2006, which repealed the law that had been in effect since 2001 (the "Old Antimonopoly Law"). The New Antimonopoly Law introduces several significant changes, particularly with respect to prior consent from the antimonopoly authorities for an acquisition. Such changes, however, are not necessarily clear and would benefit from revision.

The New Antimonopoly Law essentially retains the same structure as the Old Antimonopoly Law,

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Businesses often make two mistakes when evaluating Russia as an investment opportunity: they view unique cause célèbres as representative cases and they don't appreciate the extraordinary changes made since the 1998 financial crisis. Americans, for example, are too apt to view the State's seizure of the assets of Yukos, the country's second-largest oil company, and imprisonment of CEO Mikhail Khodorkovsky, as proof of Russia's disregard for the rule of law and irreparable weakening of civil society. The Kremlin's action was a crudely executed response to the oligarchical excesses of the Yeltsin era and should not be viewed as representative of any governmental trend toward business in general.

Whatever missteps have occurred along the way, the rule of law increasingly is respected as the foundation governing Russian society, and foreigners' rights are being recognized and protected under Russian law – on paper and in practice. That was not the case in the immediate post-Cold War era, a time of great promise but also of tremendous political and economic mismanagement, which triggered the economic crisis in 1998. Many foreign investors lost faith and exited Russia then. But the Russian government moved quickly to address the major problems underlying the instability, including widespread corporate abuses, by amending the main corporate, bankruptcy and securities laws. It strengthened shareholders' rights, increased transparency and approved clearer laws that ensured greater stability.

The Putin government has adopted measures – currency stabilization, tax reform, controlled inflation, an expanding service sector and increasing exports, among others – that have contributed greatly to political and economic stability unimaginable in the 1990s. Real economic progress is having far-reaching positive effects on the Russian and world economies. Domestically, President Putin enjoys favorability ratings of around 70%, largely reflecting these stabilization measures.

Russians today are enjoying unprecedented levels of comfort, confidence and security. Russia ended 2005 with its seventh straight year of growth and this year the government expects to run its sixth straight budget surplus. To be sure, high oil prices and prices for other natural resources are pushing much of this growth, but consumer demand and foreign investment are driving the economy as well.

Indeed, foreign investment has boomed recently, and for the first time capital inflows exceeded capital outflows. Indeed, nearly half (US$54 billion) of the US$112 billion in accumulated foreign investment in Russia was invested in 2005 by foreign investors, according to Russian state statistics. Those investments are paying off handsomely. The Russian stock market surged in 2005, with the RTS Index nearly doubling, although the market here (like all emerging market exchanges) has taken a hit recently as a result of global volatility unrelated to Russian risk.

In addition, initial public offerings of Russian companies' shares also helped them attract about US$6 billion last year versus US$700 million in 2004. Unfortunately, the timidity of American investors, who invested only about 6.5% of such foreign investment, is leaving American business and stock exchanges trailing the pack of those who recognize the opportunities in this expanding market.

American companies simply cannot afford to wait for Russia to evolve further. Yes, Russia absolutely should continue to do more to address such issues as corruption, corporate raiding and freedom of the press, but investors' rights are being recognized, protected and enforced here, and foreign investors outside the U.S. are profiting because of it.

I hope that American businesses are able to rethink the evolution that has taken place in Russia and begin to take greater advantage of the strong business climate that does exist – and leave behind certain outdated impressions. */L. Brank*

Note: This article first appeared on August 23, 2006 on *Law.com,* as part of its IN FOCUS series.

New Antimonopoly Law Changes Criteria for Filings

This fall will see the entry into force of new antimonopoly legislation which will affect both Russian and foreign companies alike and eliminate many gaps and uncertainties that exist under the current regulatory framework.

At present, competition on the Russian market is governed by two laws: the long outdated RF Law No. 948-1 "On Competition and Restriction of Monopolistic Activities on the Commodities Market," dated March 22, 1991, as amended; and RF Law No. 117-FZ "On Protection of Competition on the Financial Services Market," dated June 23, 1999, as amended (collectively, the "Current Antimonopoly Law"). The Current Antimonopoly Law will finally be replaced by a single and more modern RF Law No. 135-FZ "On Competition Protection" (the "New Antimonopoly Law"), which was signed by President Putin on July 26, 2006, and will enter into force on October 26, 2006.

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In addition to unifying the regulation of commodities and financial markets, the New Antimonopoly Law has the following advantages:

Clarification and Introduction of Terms

The New Antimonopoly Law clarifies such terms as "commodity," "commodities market" (which was amended to include not only the Russian market but also the global market), "group of persons" (which was amended to include, inter alia, a group of entities which have entered into an agreement which may result in major technological or trading advantages over other entities on the relevant market), "dominant position" (a concept of collective dominance is introduced), "monopolistic high prices," and "monopolistic low prices." In addition, the New Antimonopoly Law introduces certain new terms, for instance, "concerted practices aimed at restricting competition" and "coordination of legal entities' activities by a third party."

Prohibitions

The New Antimonopoly Law sets forth a list of violations related to the abuse of a dominant position on the market which are classified as violations per se (e.g., setting monopolistic high or low prices). No exceptions can be allowed by the court or antimonopoly authority with respect to such violations. At the same time, those violations which are not violations per se (e.g., a reduction or termination of production of certain commodities), can be allowed by the antimonopoly authority based on the principle of rationality, i.e., if the abuser proves that the abuse has a positive economic effect.

Limitation of State Control

On the one hand, the New Antimonopoly Law reduces the list of transactions that are subject to control by the Federal Antimonopoly Service ("FAS"). On the other hand, it expands the criteria through which a transaction falls under FAS control. In particular, the following transactions will no longer require FAS approval:

- the establishment, merger or acquisition of non-commercial entities or changes in the participants' structure thereof;
- the establishment of commercial entities, unless the charter of the company is paid for by shares, participatory interests or property of another commercial entity;
- charter capital increases of financial institutions;
- acquisition of shares or participatory interests, if such acquisition does not involve the acquisition of 25, 50 or 75% of shares (or 50 or 66.66% of participatory interests).

The New Antimonopoly Law introduces new criteria with regard to prior approval of or notification to FAS in connection with the acquisition of shares or participatory interests which is aimed at reducing the number of acquisitions which are subject to antimonopoly clearance.

Prior approval of the antimonopoly authorities is required if: (i) the total balance sheet value of the assets of the purchaser (its group of persons) and the target company (its group of persons) combined exceeds 3 billion Rubles (approximately US$113 million); or (ii) the total amount of sales revenues of the purchaser (its group of entities) and the target company (its group of persons) for the preceding calendar year exceeds 6 billion Rubles (approximately US$226 million); provided that the balance sheet value of assets of the target company (its group of persons) exceeds 150 million Rubles (approximately US$5 million).

A post-transaction notification of the antimonopoly authorities is required if: (i) the total balance sheet value of the assets of the purchaser (its group of persons) and the target company (its group of persons) combined exceeds 200 million Rubles (approximately US$7 million); or (ii) the total amount of sales revenues of the purchaser (its group of persons) and the target company (its group of persons) combined for the preceding calendar year exceeds 200 million Rubles (approximately US$7 million); provided that the balance sheet value of assets of the target company (its group of persons) exceeds 30 million Rubles (approximately US$1 million).

A transaction effected by a group of persons, if falling under the thresholds which imply obtaining prior approval, would require only a post-transaction notification if the information on the group of persons is duly disclosed to the antimonopoly authorities one month prior to the transaction.

Violations Procedure

The New Antimonopoly Law, in a very detailed manner, regulates the procedure for considering violations of antimonopoly regulations. These procedures are to become more like actual court proceedings. In particular, participants in antimonopoly hearings are granted the right to participate in the hearings, to review the file documents, to submit evidence, and to file motions.

Under the New Antimonopoly Law, a challenge to any

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decision or order of the antimonopoly authorities in court will suspend the execution of such decision or order until the court judgment enters into force.

Foreign Companies

The New Antimonopoly Law now clearly states that the requirements set forth therein apply to transactions between foreign companies as well as between foreign and Russian companies, if: (i) the transaction involves assets located in Russia, shares/participatory interests in a Russian company or other rights in relation to a Russian company; and (ii) such transaction could result in a restriction of competition on the Russian market.

Unfortunately, while the New Antimonopoly Law certainly introduces some progressive measures, it still seems to contemplate approval of the FAS for transactions that have a minimal effect on the Russian market but which are caught up in the rules due to the value of the target and the acquirer combined. This means that any major corporation acquiring a relatively small business in Russia will need to face the burden of receiving prior antimonopoly clearance for such acquisition. */A. Kelina*

Non-deliverable Derivatives Transactions May Become Enforceable under Russian Law

The legal uncertainty created by the application by Russian courts of Article 1062 (concerning gaming and betting) of the RF Civil Code after 1998 is intended to be addressed by a new section, 1062.2, the first reading of which was approved on June 16, 2006.

Under current Russian law, certain derivatives transactions are classified as wagering or betting, and claims arising under these transactions are not given judicial recognition in Russian courts. According to the draft amendment, derivative transactions that depend on changes in the price of securities, commodities, exchange rates, and levels of inflation, are enforceable if one of the parties is a legal entity with a banking license. In other words, a legal entity must hold a license as a professional participant of the securities market, or another license for transactions on an exchange. Individuals' claims are enforceable only if such transactions are made on an exchange.

The draft amendment, however, is poorly drafted. The International Swaps and Derivatives Association (ISDA) has suggested some changes to the Duma, namely: 1) that the scope of the transactions covered in the proposed amendment should be written broadly so that it may not be interpreted too strictly to exclude certain transactions and 2) that the amendment should specify that entities licensed under foreign jurisdictions are also eligible for judicial protection. */C. Owen, D. Gubarev*

Recent Precedent Provides Liability to Board Members in Bankruptcy of Bank

Moscow District's Commercial Court recently adopted an unprecedented decision, ruling that the debt of an insolvent bank must be repaid by both the bank's former executive officers and its board members (after the repayment of debts out of the assets of the bank). The resolution may have far-reaching implications, as it introduces a turning point in current court practice. In addition to shareholders and executive officers, members of the board of directors may also now be held liable for the debts of an insolvent company.

The claim against the managers of Open Joint Stock Company Agro-Industrial Construction Bank ("ASB-bank") was filed with the court by the State Deposit Insurance Agency (the "Agency"). ASB-bank was declared bankrupt in February 2005 and is being liquidated under the supervision of the Agency acting as liquidator.

At the end of May, the court came to two major conclusions. First, it found that the top managers of the bank were liable for the acquisition of illiquid bills of exchange. This is a relatively routine decision as holding top managers liable for the bankruptcy of a company is generally accepted practice – a few months ago, the Agency obtained a similar ruling from the Cheremushinsky District Court of the City of Moscow on collecting 240 million rubles in damages from the managers of the insolvent bank "Natsionalny."

The court's second conclusion, however, became the subject of much discussion, as it was the first time a Russian court held board members liable for the resolutions they had passed which led to the bankruptcy of the company. The court imposed liability on those who approved granting loans to insolvent borrowers, which in turn resulted in the bank's bankruptcy. Although the above case concerns a bank, its

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consequences may affect other businesses as well. It appears that a tendency is developing to hold liable all those directly involved in the making and promoting of decisions to carry out dubious transactions.

The arguments of the Agency representatives were based on provisions of the Law on the Insolvency of Credit Organizations (the "Bank Bankruptcy Law") and the Law on Joint Stock Companies (the "JSC Law"). Article 14 of the Bank Bankruptcy Law provides for the liability of the founders, directors and top executives of the insolvent bank. Article 69 of the JSC Law establishes that the executive bodies of a joint stock company must report to the board of directors, and Article 71 of the JSC Law permits a court to find a General Director and other directors liable for the damages they cause to the company. Nevertheless, Agency representatives say directors should only be held liable if there is evidence that such directors deliberately caused the bankruptcy of the company.

While director and officer insurance is widely practiced in other jurisdictions, it is rather undeveloped in Russia. The liability of directors is insured only in a handful of Russian companies. For example, RAO UES recently insured the liability of its directors and top executives for US$30 million.

Whether this decision is an isolated incident or a harbinger of things to come, it puts directors on notice that their decisions may also be scrutinized by courts and potentially result in personal liability. */K. Osipov, N. Drobilko*

Russian "AIMs"

Russia's two main exchanges, MICEX and RTS, will launch junior trading platforms for small and mid-sized companies ("SMEs"), in September and October 2006.

The MICEX market will be called Birka and the RTS market will be known as RTS Start. Both will have less onerous rules for listing; Birka will admit companies with a capitalization of over only US$30 million, and the RTS below US$100 million subject to certain annual revenue requirements.

The new initiative is intended to be a domestic alternative to the London Stock Exchange's Alternative Investment Market ("AIM"), which is currently the most popular listing platform for Russian companies. Birka and RTS Start simultaneously seek to assist in the development of SME's in Russia. */C. Owen*

Supreme Commercial Court Reconfirms Civil Remedies Against State-owned Enterprises

A Resolution of the Plenum of the Supreme Arbitration (Commercial) Court of the RF (the "Resolution") concerning the application of Section 120 of the Civil Code with respect to state- and municipality-owned enterprises, was adopted on June 22, 2006 by the Court's plenary session.

Section 120 of the Civil Code introduced the concept of an "establishment," an organizational form that may be used to set up a state-owned enterprise. An establishment is a legal entity that has no equity capital, but which is set up on the basis of a grant by the promoter of the entity of a pool of assets to which the entity acquires limited title. It has limited capacity, holds limited title to the assets made available by the owner, is funded by the owner of the assets on a budgetary basis, and corporate powers which are restricted to those necessary to attain the objectives set by the asset owner. This determines the issues that arise in the context of such entities doing business with third parties and the extent of its liability for trade debts.

The Resolution is a further restatement of the Court's stance regarding the ability of businesses to pursue civil remedies against establishments. According to the Resolution, courts will rigorously enforce the limited capacity principle and hold contracts made and transactions executed, which are *ultra vires* of the establishment's stated objectives, void. Assets held by an establishment, whether granted by the promoter or acquired with the establishment's own revenue, do not become the property of the establishment and are not available to its creditors. The only monies liable to be applied in satisfaction of debts owing to creditors are revenues generated by establishments in the course of carrying out their permitted business, and cash held by them. Where the cash of an establishment is insufficient to cover its debts, the creditor can claim against the owner of the property held by the establishment on the basis of subsidiary liability. The courts will not allow creditors to seek recovery from the owner of the assets, however, unless a demand is made against the establishment itself and the entity is joined in the proceedings against the owner.

The Resolution provides that the exceeding by the establishment of the budget set by the owner or failure of the owner to finance the establishment will be no defense to

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a creditor's claim. This approach is welcome since creditors are unlikely to have notice of the limits of the owner's financing and the policy decision, leaving the promoter liable for the proper management of the financial affairs of the establishment, and protecting creditors. */A. Trukhtanov*

Supreme Commercial Court Imposes Penalties on Late Filers with VAT Exemption

Failure by an eligible company to timely submit a complete set of documents confirming exemption from value added taxes ("VAT") will not cause a company to have VAT arrears, but will serve as a basis for imposing a penalty on the company for a delay in making VAT payments.

On May 16, 2006, the RF Supreme Arbitration (Commercial) Court adopted an unprecedented ruling,[1] which is expected to significantly affect the existing judicial practice with regard to disputes arising from the application of VAT in the RF and the procedures governing the right to apply a 0% VAT rate. (Companies are exempt from VAT in certain cases, often in connection with export transactions.)

Background

A company filed a VAT declaration to the Tax Inspectorate seeking to confirm the right to apply the 0% VAT rate, but submitted the declaration late.[2] Having considered the declaration, the Tax Inspectorate issued a ruling to impose a penalty on the taxpayer for its failure to timely submit a complete set of documents confirming the right to apply the 0% VAT rate. This penalty accrued for the period starting from the date when the duty to pay VAT had arisen (181st day) and until the date when the tax declaration and a complete set of documents confirming the right to apply the 0% VAT rate were submitted. The Tax Inspectorate subsequently confirmed the company's right to the exemption. The company brought suit, challenging this penalty.

Having considered the case, the arbitration courts of the first and second instance granted the company's claim, basing its decision on the fact that the tax authorities had subsequently confirmed the tax exemption. Thus, the court reasoned, the company had no accumulation of VAT arrears, and could not be penalized. This conclusion was based on the judicial practice of the RF Constitutional Court[3] and the RF Supreme Arbitration Court,[4] stating that "a penalty shall be deemed compensation of damages incurred by the State with regard to the delay in tax payments" and "the taxpayer shall pay a penalty when it accumulates VAT arrears, i.e., tax payments which were not paid on the due date." It should be noted that until recently, Russian courts dealing with tax disputes assumed that a penalty should not be imposed on the taxpayer provided that the taxpayer avoids any VAT arrears.

Supreme Court Reversal

On appeal by the Tax Inspectorate, the Presidium of the RF Supreme Arbitration Court reversed the lower courts' decision, concluding the following: Since the VAT declaration and the complete set of documents were submitted after the expiration of the 180 day period required by Article 165 (1) of the RF Tax Code (the "Tax Code"), the Company was liable for paying VAT at the pre-exemption rate of 10% or 18%, as applicable. The company's failure to fulfill this obligation resulted in arrears of the VAT imposed on the exported products and, subsequently, in the imposition of a penalty.

Under Article 174 (1) of the Tax Code, payment of VAT for a previous tax period must occur no later than the 20th day of the month following the end of the tax period, unless otherwise stipulated by Chapter 21 "Value Added Tax" of the Tax Code. Also, Article 165 (9) of the Tax Code sets out that in certain instances, the duty to pay VAT arises on the 181st day from the date when the customs authorities cleared the goods for export.

The RF Supreme Arbitration Court thus concluded that a penalty shall accrue for the period starting from the 181st day until the date when the tax declaration and a complete set of documents confirming the right to apply the 0% VAT rate were submitted. Thus, whereas previously a late submission for the tax exemption essentially had no repercussions, this case demonstrates that late filers will now incur significant penalties for this delay. */R. Kurmaev*

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1 No. 15326/05.

2 The Tax Inspectorate considers any declaration made after 180 days from the date when goods were exported as being late.

3 *e.g.*, Resolution of the RF Constitutional Court No 11-P, dated July 15, 1999.

4 *e.g.,* Resolution of the Presidium of the RF Supreme Arbitration Court No. 5, dated February 28, 2001, in which the RF Supreme Court summarized recommendations granted to the lower courts pursuant to its application of the Tax Code Part One.

New Banking Amendment Could "Privatize" Payments System

A draft amendment to the Federal Law "On Banks and Banking Activities" that allows companies other than credit institutions to accept payments that usually fall under banks' jurisdiction (the "Payments Amendment") passed its third reading by the State Duma on July 7, 2006. The Payments Amendment will allow companies other than credit institutions to collect money for rent and communal and telecommunications services, and also specifies that the payer has completed his or her payment obligation once the relevant payment is made to the collector (as opposed to once the money is transferred from the collector to the relevant payee).

The Payments Amendment was initially received very negatively by banking associations, who argued that it will weaken centralized banks at the regional level and will lower the standard of banking operations in general. Anatoly Aksakov, deputy head of the Duma Committee for Credit Organizations and Financial Markets, argues however, that the Payments Amendments will increase the effectiveness and proficiency of work executed by credit organizations and that the acceptance of this law will form a basis for the development and strengthening of competition in banking services in regional markets. The Payments Amendment, he claims, will raise the level of customer service for the population, will allow banks to substantially increase the depth and spectrum of banking services on offer, and will decrease the cost burden of these particular banking operations for established banks and their clients.[1]

The acceptance of payments by non-credit institutions is nothing new — the Payments Amendment essentially legalizes and regulates what is already common practice in many places. Once the practice is established by law, more options are expected to be available to consumers, who will also be better protected. */C. Owen, D. Gubarev*

1 As quoted at www.regions.ru.

New Advertising Law Sets Out New Framework for Marketing Everything from Pharmaceuticals to Securities

July saw the entry into force of the majority of provisions of the long awaited and much discussed new Federal Law No. 38-FZ "On Advertising" (the "New Advertising Law"), a significantly improved law which alters the legal framework regulating advertising activities in Russia. Set forth below are some of the major changes introduced:

I. Definitions. The New Advertising Law is more specific as to what falls within the definition of "advertisement" and what does not. For instance, announcements made by the authorities, information regarding goods and the manufacturer placed on the package, and signboards and analytical materials, which do not have a primary purpose of promoting any products, do not fall within the definition of the word for the purposes of regulation by the New Advertising Law.

II. Techniques. The New Advertising Law outlines, for the first time, the requirements for the advertisement of goods marketed by distant selling methods, advertising through telecommunications networks, and promotions involving "stimulating activities," such as lotteries or other games of chance. Also the New Advertising Law seeks to address possible attempts by advertisers to circumvent statutory restrictions, by, among other things, banning so-called "umbrella" advertising — where alcohol and tobacco products, which are covered by restrictions in advertising are promoted through the advertisement of mineral water, candies and other "harmless" products with similar trademarks.

III. Requirements. The New Advertising Law sets forth detailed requirements for different types of advertisements, such as:

A. Medical/Biological. Under the New Advertising Law, the advertisement of bioactive food additives is now regulated. Advertisements for pharmaceutical products are not permitted to make reference to concrete cases of recovery (i. e., to mention that a particular individual, for instance, a celebrity, has benefited from taking a certain medicine), affirm that a consumer has a specific disease, or show people's gratitude for the medication. All pharmaceutical advertisements must contain a message warning consumers on the use and side effects of the medication.

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B. Alcohol/Tobacco. The restrictions imposed on tobacco advertisements apply also to all smoking paraphernalia, such as pipes, cigarette papers, and lighters. The advertisement for tobacco and alcohol is forbidden outdoors, in all types of transport, radio, TV programs, motion pictures, on the first and the last pages of newspapers and on the cover of magazines.

C. Financial Services/Investment. The New Advertising Law sets out more detailed requirements on the advertisement of financial services, including banking and insurance, and on the advertisement of securities.

Whereas previously financial services could be advertised by one party but then provided by another person or entity, now advertisements for financial services must contain the name of the person or legal entity actually providing the services. Similarly, advertisement relating to the attraction of funds for share participation in real estate development (*dolevoe stroitelstvo*) must contain information on where and how to obtain the project declaration and is permitted only after (i) the receipt of a construction permit, (ii) publication of the project declaration, and (iii) state registration of the title or the lease rights to the relevant land plot.

Securities may be advertised only if they are able to be offered to an unlimited number of persons. Moreover, the advertisement of securities must include information on the person or legal entity responsible for performing the obligations under the securities (e.g., the obligations of a bond issuer), the name of the securities' issuer, and the source of information to be disclosed in accordance with Russian law. Advertising issued securities is not permitted before state registration of the relevant prospectus if such registration is required for public placement or public circulation of the issued securities.

Currently, a working group of the Council of the Federation is developing certain amendments to the New Advertising Law, including amendments relating to the prohibition of advertisement during TV programs for children. The Ministry of Internal Affairs has also suggested that outdoor advertisements should be moved beyond the so-called "red lines," which are defined by architects as conventional borders between the street and the construction area of the building. However, there is no unanimous opinion on how these "red lines" are to be defined with regard to outdoor advertisement.

While the New Advertising Law will surely increase the burden on many companies in some spheres, the greater clarity in the law will provide more certainty to companies engaging in commercial activities in Russia. */E. Filkina, D. Zernova*

UKRAINE

Improvement in Securities Regulations Benefits Non-residents

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holding structure often resulted in excessive costs for the non-resident, as well as certain procedural complications.

The Securities Decision, following the February 2006 adoption of the Law of Ukraine "On Securities and the Capital Market," further improves the securities regulatory environment in Ukraine which should help open the market to additional investors.[1] */O. Burlyuk, D. Fedoruk*

Unified Register of Court Decisions

It has been widely accepted that in recent years the Ukrainian judicial system has failed to develop practices in line with those that would be considered standard in many Western jurisdictions. The Ukrainian judicial system's reputation remains poor and, in general, confidence in the ability of Ukrainian courts to provide a fair and cost effective process for the resolution of disputes is low. While the Government has made some efforts to remove a number of the more negative aspects of the system, such as bribery, the progress of reform has been slow. Judicial decisions across the Ukrainian court system remain inconsistent, the motives of a significant number of judges remain questionable, there is limited public access to certain court decisions, and a number of courts are closed to the public.

The recently adopted Law "On the Access to Court Decisions" dated June 1, 2006 and its associated regulations[2] (collectively the "Access Law"), are aimed at addressing some of the issues mentioned above. They do this through the creation of a Unified Register of Court Decisions ("Register"), an electronic database in which every decision of every court in Ukraine is stored and made available to the public. It is hoped that the Access Law will encourage a greater level of transparency in the judicial

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1 For more on the Law "On the Securities and Capital Market" please see V. Fedichin, "Major Revamp of Securities Law," *CIS and Central Europe Legal NewsWire*, June 7, 2006.

2 Cabinet of Ministers of Ukraine Regulation, dated May 25, 2006.

process, and enable improved scrutiny of judicial decisions.

In practice, the Access Law requires that every judgment of every Ukrainian court, regardless of the court's level, be forwarded for inclusion in the Register within 15 days from when it is made. This is a stark change, as previously only decisions of certain courts were publicly available. Approximately 665 courts will be covered by the Access Law, and an estimated seven million judgments per year should be included on the Register.

The State Judicial Administration is formally charged with administering the Register. However, it is anticipated that, in practice, the Judicial Information Center (a state-owned company) will administer the Register until the Ukrainian courts are fully computerized.[3] The Access Law requires that the administrator include each decision in the Register within three days of receiving it. All personal information by which an individual might be identified (i.e. party names and addresses) must be coded and kept confidential. Only a limited number of people, such as judges and some categories of state officials, will have access to this information. The Register will be accessible 24 hours a day via the Internet on the official website of the judicial branch of government.[4] Preliminarily, paper copies of decisions will also be kept by the courts.

The implementation and administration of the Register will be financed from the state budget. While many government officials have expressed concern that the creation of the Register is wasteful spending, others see it as a significant step forward in creating a more transparent judicial system. / *O. Burlyuk*

KAZAKHSTAN

New Antimonopoly Law Establishes New Criteria for Consents

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defining "Monopolistic Activities" and "Economic Concentration," and addresses the functions and authority of the antimonopoly body. In addition, like the Old Antimonopoly Law, the New Antimonopoly Law addresses the procedure for state control over Economic Concentration, audits of entities with respect to compliance with Kazakhstan antimonopoly legislation, and investigation of antimonopoly violations, as well as the procedure for the execution, review and appeal of the antimonopoly body's decisions.

Monopolistic Activities are defined in the New Antimonopoly Law as anticompetitive agreements/agreed actions of market entities, abuse of dominant (monopolistic) position and anticompetitive actions of state bodies. The New Antimonopoly Law clarifies provisions relating to situations in which such Monopolistic Activities are prohibited.

The New Antimonopoly Law defines Economic Concentration as follows:

(a) acquisition of voting shares (share participation, interest) in the charter capital of a market entity as a result of which the acquirer obtains the right to dispose of 25% or more of the voting shares of the given market entity;

(b) acceptance by a market entity with regard to the ownership, operation and use (including by way of payment of charter capital) of tangible production assets or intangible assets of another market entity, if the book value of the assets transferred exceeds 10% of the book value of the tangible production assets and intangible assets of the market entity alienating or transferring the assets;

(c) acquisition by a market entity of rights as a result of one or several transactions (including by way of trust management, agency or co-operation agreement) allowing the determination of the terms of commercial activities of the market entity or conducting the functions of its executive body; and

(d) participation in two or more market entities by the same individuals in executive bodies or boards of directors (supervisory boards).

The New Antimonopoly Law specifies that the acquisition of shares of a market entity by a financial organization is not considered to be Economic Concentration if such acquisition is conducted for the purposes of further resale and provided that the financial organization does not take part in voting in the management bodies of the market entity.

Due to the ambiguous wording of the Old Antimonopoly Law, it was not clear when prior consent of the antimonopoly body ("Consent") was required in connection with acquiring shares or an interest in the charter capital of another legal entity. The Old Antimonopoly Law contained a provision that required consent for a company that had a

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3 No solid deadline is set; several decrees have been issued by the parliament with respect to "informatization," though implementation depends on the budget and financing to be approved by the government.

4 www.court.gov.ua

"dominant position" in a respective market. The New Antimonopoly Law sheds light on this issue, but there is not much relief for entities involved in such transactions because the New Antimonopoly Law requires Consent in more situations than the Old Antimonopoly Law.

The New Antimonopoly Law provides that the above forms of Economic Concentration require Consent if either (i) the balance sheet value of the assets of the entities taking part in the transaction *or* the aggregate volume of sales of goods for the last financial year exceeds 1.5 million times the monthly calculation index (which is approximately US$12,360,000 at current exchange rates) *or* one of the entities has a dominant (monopolistic) position in a respective market, or (ii) the acquirer is a group of entities that controls the activities of the market entities referred to in Article 13 (2) of the New Antimonopoly Law. It is not clear from the wording of Article 13 (2) of the New Antimonopoly Law which "market entities" a group of entities would need to control for the Consent requirement to apply.

Moreover, the New Antimonopoly Law expands its application to the acquisition of an interest in *any* Kazakhstan legal entity, as well as any foreign legal entity (or its branch and representative offices), that conducts entrepreneurial activities. In addition, the percentage value of the voting shares/share participation/interest increased to 25%, compared to 20% specified in the Old Antimonopoly Law.

Under the New Antimonopoly Law, the sales volume of goods, work or services is calculated by the value of income from sales minus VAT and excise tax for the last financial year preceding the year in which an application for Consent is filed should be used. As such, beginning July 28, 2006, Consent is required from the antimonopoly body for any share sale and purchase transaction where the aggregate value of assets of the companies involved in the transaction is more than approximately US$12 million. Furthermore, Consent is required for any share sale and purchase transaction where the aggregate volume of sales, that is, the sum of sales volume of all entities involved for the last financial year, exceeds US$12 million.

At first glance, the US$12 million threshold appears to be a high one. It is likely, however, that a majority of mid-sized companies involved in the acquisition of shares or interest of another mid-sized company would need Consent before proceeding with the acquisition. A market entity's dominant position is no longer the decisive factor for the Consent requirement.

It is not clear whether the New Antimonopoly Law applies to transactions conducted outside of Kazakhstan, where the relevant agreement is signed and the transaction is closed abroad. The New Antimonopoly Law may be interpreted as applying to such transactions insofar as such transactions may affect the competition of a commodity market in Kazakhstan, and the New Antimonopoly Law provides that the registration body should conduct the state registration/ re-registration of a market entity only if the antimonopoly body consents to such transaction. Registration/re-registration conducted without Consent, where such Consent is required, may be invalidated by the court at the request of the antimonopoly body. For transactions where consent is received, the New Antimonopoly Law establishes that the Economic Concentration should be carried out within one year from the date of the antimonopoly body's decision to grant Consent.

As was the case with the Old Antimonopoly Law, the New Antimonopoly Law does not list the documents or information that needs to be submitted to the antimonopoly body to obtain Consent. Most likely, the currently effective Instruction on Submission of a Request for Consent will be either amended or repealed with the introduction of a new instruction on the documents and information to be filed. In the event that the new instruction is as onerous as the currently effective instruction, share or interest sale and purchase transactions will continue to be significantly delayed because of the Consent requirement. */A. Yermekova*

KYRGYZ REPUBLIC

Privatization Program Adopted

After heated discussions, the Jogorku Kenesh, Kygyzstan's parliament, approved the 2006-2007 Privatization Program of State Property in the Kyrgyz Republic (the "Program") developed by the State Property Committee. The Program, among other things, provides a list of objects that may not be privatized, lists over 150 enterprises to be privatized within this period, and describes different privatization schemes applicable to each category of enterprises subject to privatization.

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The Program specifically prohibits the privatization of subsoil, forestry, and water resources. The Government chose to remain a stakeholder in, among others, "Kyrgyzaltyn," the largest mining company (gold and other precious metals), the railroad company "Kyrgyz Temir Jolu" and state companies that produce alcoholic products.

According to the Program, application of one privatization scheme versus another depends on the role the enterprise plays in the economy of the country, its profitability, and other such factors. The Program provides for the direct sale of state owned shares, auctions, contribution of state shares to the charter capital of another enterprise, and granting or leasing of asset management rights with subsequent purchase. About 25 companies, among which are current natural monopolies such as Manas International Airport, Kyrgyztelecom, and KyrgyzGaz, electricity distributors OshElectro, SeverElectro, VostokElectro, and JalalabatElectro, and the state airline Kyrgyzstan Aba Joldoru, are defined as strategic objects. Consequently, they may only be privatized through individually developed privatization programs approved by the Parliament.

The Kyrgyz Government expects to raise about 400 million Kyrgyz soms (approximately US$10 million) through the privatization of non-strategic enterprises listed in the Program. It is also presumably expected to raise much more from the privatization of some strategic assets. Currently, over 70% of previously state-owned enterprises have been privatized. */Kalikova & Associates, Bishkek, Kyrgyz Republic, www.k-a.kg*

RECENT DEVELOPMENTS

Boeing 787 Dreamliner Joint Venture for Titanium Production

Chadbourne & Parke LLP has acted for The Boeing Company in its US$60 million joint venture with Open Joint Stock Company "Corporation VSMPO-Avisma", the world's largest titanium producer.

The Framework Agreement which was signed on August 11, 2006 contemplates establishing a Russian joint stock company to undertake machining of titanium forgings that are manufactured by VSMPO for Boeing or Boeing's subcontractors located in Verkhnaya Salda, Sverdlovsk Region, Russia.

Titanium is a key component of the Boeing 787 and the titanium produced by the joint venture will be used in the jetliner production and assembly process.

Chadbourne is advising Boeing in all aspects of this joint venture including the establishment of the company and other related matters.

The Chadbourne team was led by Moscow office Managing Partner Laura M. Brank, supported by associates Olga Watson and Alexander Volnov.

The Boeing 787 Dreamliner is the next generation jetliner being produced by Boeing. As of the end of June 2006, the company has received a total of 403 orders and commitments for the planes.

The Dreamliner is designed to use 20% less fuel than today's planes of comparable size.

Alfa Bank RAO UES Auction of 100% Stake in Taimyrenergo

Chadbourne recently represented Alfa Bank as agent and organizer of an auction to sell a 100% equity stake in OAO Taimyrenergo, the large power utility in Russia's Krasnoyarsk region, which was owned by RAO UES of Russia.

The auction, held on July 19 among four bidders, was won by OAO A. P. Zavenyagin Norilsk Mining and Metallurgical Plant with a bid of 7.29 billion rubles (about US$272 million), a 23% increase from the initial sale price.

The auction sought to attract a private investor to acquire the shares in Taimyrenergo in order to ensure the replacement of the company's depreciated and obsolete hydro generation and electrical equipment, as well as to improve the reliability of power supply for customers.

The auction marks another major transaction in the reorganization of the state electricity monopoly.

The Chadbourne team was led by Moscow office Managing Partner Laura Brank, supported by senior associates Konstantin Konstantinov and Dmitry Gubarev and associate Oxana Gorshkolepova.

IN THE PRESS

Laura Brank was also recently featured by *Russian Investment Review* for her insight into the Russian market. For more details, please visit www.russiainvestors.com. If you would like to receive a copy of the article, please contact Iverson Long (ilong@chadbourne.com).

China National Petroleum Corporation US$1.3 Billion Sale of 33% of the Shares of Petrokazakhstan to KazMunaiGas

Chadbourne represented CNPC International Limited, a wholly-owned subsidiary of China National Petroleum Corporation, as the lead counsel in the US$1.3 billion sale of 33% of the shares of Petrokazakhstan, Inc. to JSC KazMunaiGas.

JSC KazMunaiGas, a Kazakhstan national oil and gas company, acquired the shares on July 5, 2006, of Canada-based Petrokazakhstan at US$55 a share.

CNPC, which is China's biggest oil producer, acquired Petrokazakhstan in October 2005 for US$4.2 billion. It was one of the largest overseas M&A deals done by a Chinese company.

Working for Chadbourne on the deal were Almaty office Managing Partner Kenneth Mack, London partners Claude Serfilippi and Anna McConnell, Moscow partner Shane DeBeer and Almaty associates Victor Mokrousov, Sergei Vataev, Tatiana Muratova and Asel Yermekova.

IFC US$100 Million Loan to Supermarket Chain - one of IFC's Largest Financings in Ukraine

Chadbourne & Parke LLP represented the International Finance Corporation, part of the World Bank group, in connection with a US$100 million loan to Velyka Kyshenia, one of the largest trading networks in Ukraine.

The deal, which closed in late June, marked one of the IFC's largest financings in Ukraine. Chadbourne is currently working on wrapping up the loan registration and security package for the transaction.

IFC's financing will help the company expand rapidly in larger cities in the country by taking advantage of the significant growth potential of the Ukrainian grocery retail market.

Working on the deal for Chadbourne were Kyiv office Managing Partner Jaroslawa Johnson and associates Sergiy Onishchenko and Oksana Firsova.

Details of the loan agreement were not disclosed.

Asnova Holding's Two Recent Ukraine Deals

Chadbourne recently represented Asnova Holding on two transactions in Ukraine — advising on the sale of 65% of the shares of the biggest network of perfume and cosmetology products retail outlets, and working on a loan to another unit of the company.

In the most recent deal, the A.S. Watson Group, a worldwide retailer, has agreed to purchase 65% of the shares in the retail outlet DC.

Working on the transaction for Chadbourne was Kyiv office partner Adam Mycyk.

In the other deal, Chadbourne represented a unit of Asnova in connection with an International Finance Corporation loan of US$8 million. The loan was provided to the company to enable it to expand its warehousing, customs licensing, and logistics business, which will enable it to boost the volume of its operations and improve the quality of its services.

Adam Mycyk worked on this deal with senior associate Olexiy Soshenko.

Almaty Team Outgrows Office

Chadbourne is pleased to announce that our Almaty team has relocated to new quarters as of August 7, 2006. Immediately recognized as a leading practice in several areas after opening in July of 2005, with a continually developing client base, the team quickly outgrew its office space. The team is currently comprised of 20 attorneys and other support staff. The Almaty team is led by Kenneth E. Mack, the managing partner of the office. Other team members include associates Victor Mokrousov, Tatiana Muratova, Yevgeniya Nossova, Elena Pestereva, Sergei Vataev, Elshat Seksembayeva and Asel Yermekova.

The new office is located at:

Dostyk Business Center
43 Dostyk Avenue, 4th floor
Almaty 050010, Republic of Kazakhstan

Telephone and fax numbers remain the same:

T: + 7 (3272) 585-088
F: + 7 (3272) 588-084

AT THE PODIUM

Financing the Growth of Russian and CIS Companies on the London Stock Exchange

(London, June 22-23). Chadbourne's Russia and CIS practice sponsored the FinLab (Financial Laboratory at the London Stock Exchange) annual conference for a large number of Russian and Central Asian companies planning to raise capital in London in 2006-07.

Hosted by the London Stock Exchange, the conference addressed some practical questions concerning the anticipated "Russian & CIS IPO boom" in London and sustainability of demand for the Russian and CIS assets in 2006-07.

Laura Brank, Head of the Russia and CIS Practice, Kenneth Mack, Managing Partner of the Almaty office and Konstantin Konstantinov, senior associate in the Moscow office, delivered presentations on day one of the conference covering the capital markets regulatory framework and developments in Ukraine, Russia and Kazakhstan. Christopher Owen, Partner in the Moscow office, chaired day two of the conference on "Local listing or AIM ... or both?"

On day two, Chadbourne's attorneys also took part in one-to-one meetings with delegates, which covered issues relevant to individual companies.

For a copy of Chadbourne presentations, please contact Iverson Long (ilong@chadbourne.com).

Syndicated Lending in Russia & CIS

(Moscow, October 5-6). Dmitry Gubarev, senior associate in the Moscow office, will speak on syndicated lending from a borrower's perspective at this fourth annual conference sponsored by Raiffeisenbank.

The Ukrainian Banking Forum

(Kyiv, November 8-9). Chadbourne is sponsoring this inaugural Adam Smith Conference. Jaroslawa Johnson, Managing partner of the Kyiv office, will participate in the session focusing on mergers and acquisitions.

UPCOMING

KIOGE 2006 14th Kazakhstan International Oil & Gas Exhibition & Conference

(Almaty, October 3-6). Kenneth Mack, Managing partner of the Almaty office, Moscow Managing partner Laura Brank, Moscow partner Shane DeBeer, and London partner Charez Golvala will attend this Chadbourne sponsored annual exhibition and conference. Mr. Mack will participate in the session focusing on "Socially Responsible Oil and Gas Field Development".

CIS AND CENTRAL EUROPE LEGAL NEWSWIRE

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