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Dechert in Russia

Major Amendments to Corporate Laws



by **Evgenia Korotkova** and **Tatiana Kozlova**

At the end of last year, new legislation introduced

significant changes to Russian corporate laws. This was part of the current anti-crisis program of the Russian government. The most significant new development was that a “debt to equity” swap is now permitted under Russian law, thus facilitating the capitalization of Russian companies.

In addition, a “cure” period is provided to Joint Stock Companies (“JSCs”) with respect to the application of enforcement measures under Russian law where a JSC’s net assets have fallen below its charter capital at the end of a financial year. Greater protection is also given in such circumstances to the creditors of JSCs. Limited Liability Companies (“LLCs”) are excluded from the benefit of these particular changes, for reasons which are not currently clear. Finally, there are also new provisions with respect to the issue and guarantee of bonds. The new legislation, Federal Law No. 353-FZ, dated 27 December 2009 “On Amending Several Legislative Acts of RF...” (the “Law”) amended the following Russian laws:

- the RF Civil Code (the “Civil Code”);
- Federal Law No. 14-FZ “On Limited Liability Companies” (the “LLC Law”);
- Federal Law No. 208-FZ “On Joint Stock Companies” (the “JSC Law”);
- Federal Law No. 39-FZ “On the Securities Market” (the “Securities Market Law”);

- Federal Law No. 395-1 “On Banks and Banking Activity” (the “Bank Law”); and
- Federal Law No. 129-FZ “On the State Registration of Legal Entities and Entrepreneurs” (the “Law on Registration”).

Debt to Equity Swaps

The Law for the first time expressly permits debt to equity swaps for Russian companies, if such debt is owed either to existing shareholders or non-shareholder lenders. Such changes do not however permit debt to equity swaps for financial institutions, such as banks, etc.

The Law is likely to be welcomed by the business community, particularly as complex structures (usually involving off-shore vehicles) were previously needed to get around the former Russian law prohibition on converting debt into equity.

The cancellation or reduction of debt owed by a JSC to its shareholders is permitted through the issuance of additional shares in a private (closed) subscription. For LLCs, the cancellation or reduction of debt is permitted through an increase of the charter capital, or through the payment of initial charter capital which has not yet been paid. A debt to equity swap by an LLC must be approved unanimously by its participants.

A New “Cure” Period for JSCs to Fix Their Net Assets/Charter Capital Ratio

Previously, Russian law provided that if, at the end of each of two or more financial years, a company’s assets were less than its charter capital, such company was obliged at the end of that financial year to immediately undertake a reduction in its charter capital to the level of its net assets.

In addition, if such a reduction in charter capital would have led to the charter capital falling below the minimum charter capital level prescribed under Russian law (currently RUR 100,000 for Open JSCs, and RUR 10,000 for Closed JSCs and LLCs), the company would be liquidated. These provisions remain with respect to LLCs, but JSCs have been granted a “cure” period under which they can take steps to remedy the situation. This issue has often complicated acquisitions of Russian companies because purchasers were reluctant to buy companies due to the risk of liquidation. The Law improves the situation for JSCs, while at the same time increases its reporting requirements.

The Law now provides that if, at the end of two or more financial years, a JSC’s net assets are less than its charter capital, such JSC will be granted a cure period of one year in which it can attempt to increase the company’s net assets. However, the Law also introduces a number of requirements.

Firstly, if, at the end of the second or any subsequent financial year, a JSC’s net assets are still less than its charter capital, the following information must be included in the JSC’s annual report:

- an analysis of the data on the value of the company’s net assets for the three preceding financial years (or all preceding financial years if the company has existed for less than three years);
- the results of an investigation into why the net assets are less than the charter capital; and
- a list of actions that will be taken to fix the ratio of net assets to charter capital.

Secondly, if the JSC’s net assets are still less than the charter capital by more than 25% as of the end of three, six, nine or 12 months of the financial year, following the second financial year, or any subsequent year thereafter, and for this period the net assets remain less than the charter capital, the JSC is obliged to publish certain notifications (in a publication which publishes information on the status of legal entities) that its net assets are below its charter capital.

Finally, if the JSC’s net assets remain less than the JSC charter capital, based on the results of the financial year following the second or any subsequent year, as a result of which the net assets value is less than its charter capital, the JSC must, within six months of the end of such financial year,

vote to reduce the charter capital to the level of its net assets or apply for its liquidation.

If a JSC adopts a decision to decrease its charter capital, it is obliged to:

- file the information with the Unified State Register of Legal Entities within three business days of the date that the relevant decision was adopted; and
- publish the information in a publication which publishes information on the status of legal entities.

If the JSC does not comply with its obligations under the law, creditors may demand early repayment of the JSC’s obligations, or if this is not possible, demand that such obligations are terminated and the related losses reimbursed. In addition, the relevant responsible authority may file a claim for the liquidation of the JSC to court.

Creditors’ Rights

In the event of a decrease of the charter capital of a JSC or a decrease in its net assets, the creditors of the JSC (whose rights of claim existed prior to the information on a decrease of the charter capital/net assets being published) are entitled to request the performance of the JSC’s obligations during the 30-day period starting from the date of the latest publication of such information (with a new six-month statute of limitations period). However, if the JSC proves that either the decrease of the charter capital or the net assets does not affect the creditor’s rights, or the security provided for under a particular obligation is sufficient, a court is entitled to dismiss the creditors’ claim.

The Issuance of Bonds

The Law states that bonds may only be issued by companies once the charter capital of such company has been paid in full. In addition, the nominal value of such bonds may not exceed (i) the charter capital and/or (ii) the value of the security provided under the bond. If no security is provided under the bond, companies may issue bonds only if such companies have been in existence for at least three years and their financial statements for the previous two years have been duly approved by their directors and shareholders.

These new rules, with respect to the issuance of bonds, do not apply to or affect existing rules in relation to mortgage-backed bonds, bonds issued by listed companies or bonds issued by companies with high credit ratings.

The Law introduces a list of persons who may act as guarantors under a guarantee securing performance of an issuer's obligations under a bond. This list includes (i) companies with net assets of at least the same value of or greater than the sums guaranteed, (ii) state entities as permitted by Russian law or (iii) international financial institutions as permitted under Russian securities laws.

The Law also stipulates material conditions which must be included in such guarantees, including joint and several liability of the guarantor and the bond issuer, and a minimum term for the guarantee of one year in excess of the term of the bond.

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Amendments to Securities Legislation Provide Definitions and Outline Terms and Conditions for Derivatives and Repo Transactions



by **Asiyat Kulterbaeva**
and **Kirill Skopchevskiy**

On January 1, 2010, legislation titled "On Amendments to Part One and Part Two of the

Tax Code of the Russian Federation and Certain Legal Acts of the Russian Federation" (the "Law") came into force, making amendments, among other provisions, to the existing securities legislation "On Securities Markets," dated 22 April 1996. An innovative piece of Russian legislation, the Law finally provides definitions for key securities market terms, including "financial instrument," "derivative," and "repo transaction." It should be noted that provisions in the Law detailing the specifics for the conclusion of derivatives contracts will not come into force until July 1, 2010.

Although the Law falls short of providing detailed terms and conditions for every aspect of derivatives and repo trading (and does not fill the legislative gap with respect to international derivatives and repos), it is nevertheless a very important development. It introduces long-awaited outline terms and conditions for derivatives transactions and will allow self-regulatory organizations and professional

market participants to take the lead and further develop detailed standard terms based on the regulatory framework. The essential amendments to securities laws introduced by the Law are described below.

Financial Instruments and Derivatives

The Law has removed a significant gap in legislation by introducing the definition of a "financial instrument," which was a term often used but not properly defined in existing securities laws. Now, a "financial instrument" is defined as either a "security" or a "derivative." How the Law defines a "security" is relatively straightforward, but there are some issues to note under the new rules with regard to the definition of a "derivative."

The definition of a "derivative" in the Law includes well-known and commonly traded instruments such as standard swaps, forwards, futures and options linked to commodities, securities, FX and indices. It also covers more complex financial instruments such as inflation rate derivatives, interest rate derivatives, weather derivatives and credit default swaps. In respect of deliverable contracts, they must expressly state on their face that they are a derivatives contract in order to qualify as such. Deliverable contracts with terms of delivery of less than three days (i.e., "spot," "today," and "tomorrow" delivery terms) are not included in the definition of a "derivative" and therefore fall outside the new regulatory framework.

If the parties intend to enter into a number of derivative transactions, the terms and conditions which govern such transactions should be stipulated in either a separate framework agreement, and/or by stock exchange regulations (if relevant), and/or through the rules of a clearing house (if relevant). However, the Law specifically suggests that standard form documents may be developed by self-regulatory organizations. The Law suggests that such standard form documentation may contain terms relating to the grounds and procedure for termination of multiple derivative contracts between the same counterparties. Ideally, this will promote the development of Russian self-regulatory organizations and market-standard documentation analogous to the International Swaps and Derivatives Association (ISDA) and the standard form documents created by it.

The Law separately regulates derivatives entered into between "qualified investors" only. From July 1, 2010, derivatives designated for qualified investors only may be executed through brokers only (except where a derivative is obtained through a succession, conversion, reorganization, allocation of assets on a winding up, or otherwise through operation of law,

or in other circumstances provided for by the Federal Service on Financial Markets of the Russian Federation). The term “qualified investor” includes domestic financial institutions, foreign financial organizations and individuals, and legal entities which meet certain criteria.

The Law now also specifically provides for the possibility of counterparties entering into credit default swap transactions. Market-traded credit default swaps may be entered into where (a) both parties to the transaction are admitted to trade on the Russian securities markets, (b) the “protection seller” (i.e., the party who sells protection against specified credit events such as a default, restructuring, or bankruptcy) is a qualified investor, and (c) the “protection buyer” is a legal entity other than an individual. Over-the-counter credit default swaps (i.e., contracts traded and privately negotiated directly between two parties, without going through an exchange or other intermediary) are allowed only when the protection seller is a credit organization, broker or dealer, and the protection buyer is a legal entity other than an individual.

It should be mentioned that the Law does not regulate transactions involving international derivatives. As a result, the existing Russian securities laws remain relevant, which state that where such international financial instruments are not admitted to public placement and circulation in Russia, they are available only to qualified investors and only through brokers.

It is also worth noting that Russian gambling laws have potential application to derivative transactions in Russia. However, it is not clear whether all derivatives will be regulated as a type of gambling transaction due to differences in the definition of “derivative” between the Law and the Russian Civil Code. Hopefully, this inconsistency will be clarified in the near future.

Repo Transactions

The Law provides a new definition for a “repo transaction” which replaces the former definition provided by the Russian Tax Code.

A repo transaction (or “sale-and-repurchase” transaction) is divided into two parts: under the first part, the seller sells securities to the buyer; under the second part, the seller repurchases the same (or fungible) securities back from the buyer within a stipulated term or on a specified date.

A natural person may only enter into a repo transaction if the counterparty is a broker, dealer,

custodian, asset manager, or clearing or credit organization; otherwise he/she must engage a broker to transact the repo on his/her behalf.

The only repo transactions regulated under the Law relate to the sale and repurchase of (a) securities of a Russian issuer, (b) investment units of a unit investment fund managed by a Russian asset manager, (c) shares or bonds of foreign issuers or securities of a foreign issuer which certify rights in relation to securities of Russian issuers.

The seller under a repo transaction is obliged to transfer securities free from any encumbrances, except when the buyer agrees to accept the encumbered securities. Where the seller fails to deliver free and clear title, and the buyer did not know and could not have known about the encumbrances, the buyer has the right to terminate the repo transaction.

The Law allows certain flexibility in the structuring of repo transactions in that re-hypothecation of the transferred securities by the buyer may be permitted or disallowed depending on the agreement of the parties. The parties may also provide for an obligation for one or either party to pay money or transfer back the securities where there is a specified change in the price of the securities.

The Law also provides certain grounds for the termination of a repo transaction due to the non-performance or improper performance by one or both of the parties of its obligations under the second part of the transaction.

As above in respect of derivative transactions, if the parties intend to enter into more than one repo transaction, the terms and conditions of such transactions may be stipulated in a framework agreement between the parties, the stock exchange regulations, or the rules of a clearing house. Key provisions, such as the requirements for the termination and settlement of multiple repo transactions, will be included in these as in the case of derivatives contracts as described above.

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New Legislation Addresses Competition and Price Issues in the Wholesale and Retail Food and Beverage Sector



by **Timur Djabbarov**

On February 1, 2010, a new Russian law, “On basics of trade activity regulation in the Russian Federation” No. 381-FZ of December 28, 2009 (the “Law”), came into force that will

significantly affect both the wholesale and retail food and beverage sectors in Russia. While the Law is mostly aimed at supporting domestic producers, there is also a significant anti-monopoly component, including restrictions on sudden price increases and regulation of expansion of both wholesale and retail chains into other regions.

In addition, the Law will regulate the following issues for the first time:

- the restriction on the receipt of premiums on contractual sale prices by retailers and wholesalers (which could be very disruptive to standard retail practice);
- the establishment of time limits for the payment of suppliers;
- the establishment of a threshold for market dominance of the sale of food and beverage products; and
- a prohibition on forcing market participants to accept unfair contractual terms.

Scope of Regulation

The Law governs “trade activity” between two economic entities, or between an economic entity and a state or local authority, but excludes the following types of transactions from its scope:

- the international sale of goods;
- commodities exchange trade;
- trade in traditional, covered or open food markets or bazaars;
- trade in securities, real estate rights, industrial and technological products, electricity, heating or trade in other energy resources; and
- the sale of restricted goods, such as certain pharmaceutical products or hand weapons.

The Law also defines a “trade chain” as two or more commercial entities, under “common management” (a concept which is still relatively unclear under Russian law and may in practice be interpreted rather broadly), or operating under a common brand name or other close commercial relationship. A trade chain will in practice refer to a wholesale or retail seller of a range of products from different suppliers.

The scope of the Law is not limited to the supply of food and beverage products, yet the key provisions of the Law, as discussed in this article, will only apply to this sector.

Key Provisions of the Law

Introduction of a “Dominance Threshold”

The Law introduces a provision prohibiting the acquisition or lease of additional floor space or sale premises by trade chains if such trade chain’s share in the market for food and beverage products exceeds 25% of the value of all food and beverage products sold. This provision applies where such market share is established in the previous financial year within specified administrative areas (these include constituent territories of the Russian Federation, city districts and municipal districts).

This amendment is intended to both provide improved regulatory conditions for the growth of smaller wholesalers and retailers and also to facilitate the entry of larger retailers into the provincial regions.

The Imposition of Price Ceilings after Prices Have Risen Dramatically

The contract price for the supply of food and beverage products remains a matter to be determined through the agreement of the parties. However, the new legislation provides for the possibility that the Russian government may establish maximum prices for certain types of essential food and beverage products (such as bread, milk, salt or sugar—these will appear on a list to be published by the government), where there has been a sudden price increase of 30% within 30 calendar days in a constituent territory of the Russian Federation.

Restrictions on Premiums in Supply Contracts

Since the adoption of the Law, contractual premiums on certain activities involved with the sale of food and beverage products must not exceed 10% of the basic contractual price for the product. Currently, premiums “for access to shelves” are

often included in the supply price of products, increasing such prices considerably. The Law will restrict this practice. In addition, such premiums will be illegal for the sale of certain types of essential food and beverage products (which will appear on the same list published by the government with respect to regulating sudden price increases). In addition, introducing other types of premiums payable to a trade chain into the price of the supply contract will not be legal under the Law. These new restrictions could be very disruptive to standard retail practice.

Time Limitations for Payment?

The Law imposes time limits for payments made under supply agreements for food and beverage products. Subject to the provision of an invoice, products whose shelf lives are less than 10 days must be paid for within 10 business days from the date of delivery and acceptance. If the shelf life is from 10 to 30 days (inclusive), then payment must be made within 30 calendar days. For products whose shelf life exceeds 30 days and for Russian-made alcoholic beverages, payment must be made within 45 calendar days.

Competition Provisions

The Law also contains several competition provisions which restate and amend Federal Law "On Protection of competition" No. 135-FZ of July 26, 2006, by now prohibiting both suppliers and trade chains in the food and beverage products sector from carrying out certain anti-competitive actions, in particular:

- creating distortions in the market, by hindering the access of competitors to the market, or through of the imposition of artificial price levels;
- to force on other market participants any of the following types of contractual terms:
 - restrictions on their ability to conduct trade with competitors;
 - unfair or one-sided contractual terms;
 - provision of information on contracts with competitors;
 - payments for access to supply to new or existing outlets or operations;
 - imposing restrictions on the prices of products;

- the return of unsold products where ownership and liability for the product has already passed to the trade chain; or
- the reimbursement for loss or damage to products where ownership in the products had passed to the trade chain before such loss or damage was caused and the loss or damage was not due to any fault of the supplier; and
- carrying out wholesale activities using a commission agency contract or otherwise a mixed contract which includes commission agency provisions.

Legal Status

Supply contracts concluded prior to commencement of the Law must be amended to comply with the Law within 180 days of the entry into force of the Law. Any agreements concluded after the commencement of the Law in violation of its procedures and restrictions will be considered void under Russian law and could be unwound under Article 169 of the Civil Code.

Liability

The Law does not introduce any special liability for breaches of its provisions so such breaches shall create civil, administrative and criminal liability in accordance with the usual laws of the Russian Federation.

Conclusions

The Law has been adopted as an additional anti-crisis measure aimed at assisting domestic producers and suppliers of food and beverage products. At the same time, quite a few of its innovations significantly restrict the business activities and freedom of contract of larger retailers and wholesalers, both foreign and domestic, and will significantly impact standard practices in the retail industry. In practice, the Law may lead to a contraction of the economic activities of the larger food and beverage product retailers and wholesalers and to a partial loss of the investment appeal of this sector.

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Draft Law Regarding Amendments to the State Arbitrazh Procedural Code of the Russian Federation



by **Timur Djabbarov** and **Irina Kulyba**

The Draft Law “On Amending the Arbitration Procedure Code” (“APC Draft Law”), currently progressing through the Russian legislative process, will modernize and provide

further regulation to Russian arbitrazh proceedings. The APC Draft Law will provide greater detail on the role of arbitrazh assessors in arbitrazh proceedings and will allow the minority reports of judges in arbitrazh proceedings to be published for the first time and the progress of cases to the higher courts will be further regulated. The jurisdiction of the Supreme Arbitrazh Court of the Russian Federation with respect to disputes between regional authorities or between the State and regional authorities is also subject to amendment. Furthermore, the electronic filing of court documents, videoconferencing ability in court hearings and a positive obligation to check a court’s website for notices are introduced into the arbitrazh law for the first time.

However, it should be noted that as the APC Draft Law is only at the first reading stage, even if it does eventually enter into law it may do so in a substantially amended form.

Arbitrazh Assessors

Arbitrazh assessors participate in court proceedings and possess certain judicial powers in the determination of a case, but do not have judicial status. Arbitrazh assessors provide assistance to the judge and make determinations on certain points based on the application of their specialist knowledge and experience (which the judge may not possess). They usually participate in cases involving complex subject matters, which require technical knowledge or commercial experience to be properly understood, such as banking, securities markets or international law.

The APC Draft Law would provide greater transparency to the selection process for arbitrazh assessors. Arbitrazh assessors will no longer be selected by the parties to the proceedings but will instead be chosen at random from a database or through another method which at least prevents interested parties from influencing the selection of the arbitrazh assessor. Only suitably qualified candidates will be put forward for selection as arbitrazh assessors under the proposed arrangements.

The APC Draft Law also provides for the replacement of arbitrazh assessors where there is a dismissal or resignation, or a long-term absence from proceedings because of illness, vacation, study leave or a business trip. It also states that if it is not possible in such cases to find another suitably qualified person to fill the role, the case may be heard without an arbitrazh assessor.

Publication, Procedure, and Jurisdiction

The minority reports of judges in arbitrazh proceedings should be published in addition to the decision of the case under the draft rules. This will allow both arbitrazh participants and third parties to read such minority reports, which the APC Draft Law provides must be included in the court file and/or published on the court website.

The progress of cases through the higher courts will be further regulated, so that arbitrazh decisions at the first instance can only be appealed to the arbitrazh courts of appeal and only then to the arbitrazh courts of cassation. The APC Draft Law is an attempt to prevent parties leapfrogging the courts of appeal and appealing directly to the courts of cassation. Abuse of the procedure as it now stands sometimes occurs and the draft legislation will attempt to stamp out this practice.

The proposed introduction under the APC Draft Law of procedural time limits is an attempt to streamline the administration of justice and arises partially out of the right to due process within a reasonable timeframe provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms, to which Russia is a party. It is suggested that account will be taken of the differing nature of various categories of disputes when such procedural time limits are being set and that the practice for setting such procedural time limits will be standardized.

The jurisdiction of the Supreme Arbitrazh Court of the Russian Federation is also subject to change under the draft legislation. Economic disputes between the Russian Federation and its regional administrative entities, or between different regional administrative entities themselves (particularly with respect to real estate disputes), will be excluded from the jurisdiction of the Supreme Arbitrazh Court. The APC Draft Law is aimed at removing inconsistencies in existing legislation with respect to the jurisdiction of such real estate disputes and would confirm that such real estate disputes should be held in the state arbitrazh court of the region in which such real estate is located.

The Use of Modern Technology, Court Notices, and Communications

The APC Draft Law provides for electronic filing of court documents and the use of videoconferencing facilities when giving evidence in court. This will provide greater flexibility to the filing of court documents in arbitrazh proceedings and will reduce travel costs for those who currently must travel long distances in order to give evidence at arbitrazh hearings.

The APC Draft Law provides further guidance on the provision of notices and information to parties during arbitrazh proceedings. Judicial summons for legal entities should be sent only to the legal address specified on the State Unified Register of Legal Entities. Judicial summons for individual entrepreneurs should be sent to the address specified on the State Unified Register of Individual Entrepreneurs. This is to avoid parties claiming that they have not been properly served court documents through the sending of court documents to the wrong address, where that company or person uses a number of addresses for different administrative purposes.

Parties to arbitrazh proceedings will also be required under the draft legislation to take measures to discover information related to their case, in particular directly after the commencement of proceedings and after the first court decision. This would include checking the court's website or communicating with the court by email or by phone and/or fax. The motivation behind this requirement is to prevent parties from claiming that court documents were lost in the post or otherwise not received in order to delay a hearing or otherwise challenge an outcome.

It should be noted that the draft legislation, as far as it relates to the electronic filing of documents, videoconferencing facilities and electronic communications in arbitrazh proceedings, would require further legislation, for the procurement of new technology by the relevant arbitrazh courts, to be passed before becoming effective under Russian law.

Other Amendments

The APC Draft Law also provides for certain amendments related to the following items:

- court costs;
- the procedure for the issuance of enforcement orders; and

- the consequences of non-compliance with arbitrazh court decisions.

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A Proposed Reduction in the Time Limit for the Registration of Commercial Mortgages



by **Irina Kulyba** and
Kirill Skopchevskiy

The time limit for the registration of commercial mortgages by the registration authorities under Russian law is likely to be reduced from one month to 15 business days in the coming months. The Draft Law "On amending Article 13 of the Federal Law "On state registration of rights with respect of real property and transactions therewith" and Article 20 of the Federal Law "On mortgage (real estate pledge)" (the "Draft Mortgage Law") is currently at the first reading stage in the Russian State Duma. This comes after a survey was conducted by the Ministry of Economic Development of the Russian Federation which showed that fifteen business days was sufficient time to allow for registration of commercial mortgages.

The proposed reduction in the time limit would speed up the procedure for the registration of commercial mortgages and will be welcomed by the business community. Under Russian law, mortgage agreements are not legally effective until they have been registered with the registration authorities. The Draft Mortgage Law imposes a duty on the registration authorities to ensure that commercial mortgage agreements are registered within 15 days of their receipt.

A survey by the Ministry of Economic Development concluded that the maximum period of time for the registration of commercial mortgages on various types of real estate was between six and 15 business days. The survey included both new construction projects and existing developments and the 15-day time limit under the Draft Mortgage Law arises out of these findings. In more economically developed regions, the registration procedure was found to be

quicker than in less developed regions. This should be taken into account when submitting a registration.

The Draft Mortgage Law should expedite the process of entering into real estate finance transactions and promote investment in the real estate sector and the Russian economy in general.

An amendment to real estate legislation passed on December 22, 2008, the Federal Law “On amending the Federal Law ‘On mortgage (real estate pledge)’ and several legislative acts of the Russian Federation” (the ‘Residential Mortgage Law’) has already expedited the registration procedure for residential mortgages. The Residential Mortgage Law, however, provided for an even shorter registration period than the Draft Mortgage Law provides for, by reducing the time limit for the registration of residential mortgages to five business days. The Residential Mortgage Law has been a success and is considered to have increased the attractiveness of mortgage-backed lending in the residential sector.

The Draft Mortgage Law would not amend any current federal legislation, nor would it require the adoption of any supplementary federal laws. Instead, it would require the adoption of an act by the Ministry of Economic Development of the Russian Federation. Though the Draft Mortgage Law is currently only at the first reading stage, we expect the proposals to become law in the coming months.

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Constitutional Court of the Russian Federation on the Way to Introducing Judicial Precedents into the Legal Framework



by **Oxana Peters** and
Timur Djabbarov

On January 22, 2009, the Constitutional Court of the Russian Federation (the

“Constitutional Court”) found constitutional grounds to recognize judicial precedents in commercial court cases, as set out in a Resolution (the “Resolution”) of the Plenum of the Supreme Commercial Court of the Russian Federation (the “SCC”), which was adopted in 2008. The Resolution acknowledged the role of judicial precedents in Russian commercial law by making the decisions of the Presidium and the Plenum of the SCC binding with respect to all commercial courts. It also allowed cases that had previously been decided differently by the SCC to be reopened.

Russia, of course, has a continental system of law, where the decisions of courts on commercial disputes have never previously been used as direct sources of law. Instead, the law has previously been derived directly from applicable codes and legislation. However, as dynamic economic growth has naturally produced the side effect of much more commercial litigation in Russia in the last 10 years, many jurists and business leaders have called for a strengthening of the role of judicial precedents established at the level of the SCC. The SCC is the highest authority for the settlement of economic disputes among legal entities and individual entrepreneurs in Russia. With the recognition of legal precedents, it is hoped that not only will court decisions be more predictable, but also that the enforceability of various commercial practices will become clearer.

The decision of the Constitutional Court, in acknowledging the constitutional grounds of the Resolution, allowed judicial precedents to take effect in a limited way under Russian commercial law, but also stressed the “exceptionality” of situations where a decision of the SCC would have retroactive effect on past cases and would allow for the reopening of a past case. In particular, the Constitutional Court stressed the following limitations on the provisions of the Resolution:

- decisions of the SCC would have a retroactive effect only in “exceptional” cases and only where the SCC itself indicates the retroactive effect of a precedent. The Constitutional Court unfortunately provided little guidance on what an “exceptional” case refers to; and
- the setting of a precedent in a SCC case will not constitute definitive grounds for the reopening of a case in a court of first instance.

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Honors**Moscow Office Managing Partner Laura Brank Recognised in The Lawyer Hot 100**

We are delighted to report that along with just eight other lawyers, Laura Brank has been listed in the corporate section of the 2010 edition of *The Lawyer Hot 100*, an annual list of lawyers who have excelled in their field over the previous year. The survey praises Ms. Brank as “one of the best-known ... and best-connected lawyers in the [Russian] market.”

Promotions**Dechert Announces New National Partner in the Moscow Office**

We are delighted to announce that Evgenia Korotkova was promoted to national partner in the fourth quarter of 2009. Evgenia Korotkova has been advising Russian and multinational clients since 1993 on major local and cross-border M&A transactions, joint ventures, and divestitures. She also advises on general corporate and commercial matters, antitrust, real estate, employment, banking, currency regulation, licensing, and IP matters. Ms. Korotkova was listed as a leading lawyer for corporate/M&A in Russia by Chambers Europe (2007). She is a graduate of Lomonosov Moscow State University (1993) and also attended Leiden University Law School, The Netherlands (1994).

Recent Deals

Dechert’s Moscow team is advising Kinross Gold Corporation (“Kinross”), the NYSE- and TSX-listed, Canadian-based gold mining company, on its recently announced proposed c. US\$368 million acquisition from a seller related to Millhouse of the high-grade Dvoinoye deposit (a strategic company) and the Vodorazdelnaya property in the Chukotka region of the Russian Far East. The purchase price comprises US\$165 million in cash and approximately 10.56 million newly issued Kinross shares (with a market value of US\$203 million, as of market close on January 19, 2010).

Since joining Dechert in mid-2009, our Moscow corporate team has represented a number of other significant clients, including:

- Court Square Capital Partners on its acquisition of the Russian operations of Rocket Software Inc.
- a private investment company on its acquisition of a controlling stake in a major Russian insurance company
- JSC KAMAZ, the major Russian automotive corporation, on its €5.9m (US\$8.92m) 50:50 joint venture with Germany’s Daimler AG and €4.1m (US\$6.12m) 50:50 joint venture with Germany’s Daimler AG and Japan’s Mitsubishi Fuso Truck and Bus Corporation
- Eastone Group on the sale of its stake in a joint venture with TNK-BP for the development of an oil license to TNK-BP.

Upcoming/Recent Seminars and Speaking Engagements

November 9, 2009: Dechert sponsored The Eurasia Center & The Eurasian Business Coalition’s Fall 2009 Conference: Doing Business with Russia at the Russian Trade Mission and The Russian Cultural Centre in Washington, DC. Laura Brank spoke on “The Impact of the Strategic Sectors Law on the Russian Oil & Gas Sector.”

December 1, 2009: Dechert sponsored Adam Smith Conferences’ 16th International Russian Banking Forum at the Grange City Hotel, London. Laura Brank joined an esteemed panel of senior executives for a panel discussion titled “The Changing Landscape of the Russian Banking Sector in 2009: a Review of the Government Anti-Crisis Measures.” The panelists discussed the current Russian banking environment and made recommendations as to how

creditors should amend pledge agreements in light of changes to the legislation governing secured transactions.

February 9: Dechert hosted a seminar titled “Guarding Against Corruption Offences in Domestic and International Business” at the Moscow Marriott Grand Hotel. Chaired by Laura Brank, the seminar covered the following topics: “Anti-Corruption and The U.S. Foreign Corrupt Practices Act” (David M. Howard, Dechert); “Anti-Corruption Legislation in the UK” (Andrew Hearn, Dechert); “Russian Anti-Bribery Laws” (Olga Watson, Dechert); and “Investigation and Prosecution of Corruption in the U.S. and Russia” (Thomas Firestone—Resident Legal Advisor, U.S. Department of Justice, U.S. Embassy, Moscow).

February 17—19: Dechert is sponsoring Adam Smith Conferences’ 15th annual CIS Metals Summit (incorporating the CIS Precious Metals Summit) at the Moscow Marriott Grand Hotel. Laura Brank will be speaking on February 17 on subjects including the Strategic Sectors Law in Russia and potential improvements to the current regime for investors in the metals sector in Russia and the CIS.

To register for this conference or for more information, visit adamsmithconferences.com or contact info@adamsmithconferences.com.

To obtain a copy of the related presentation materials, please contact Andrew Robinson (+7 499 922 1139 / andrew.robinson@dechert.com) or Kieran Morgan (+44 207 184 7853 / kieran.morgan@dechert.com).



We welcome your feedback. Please let us know if there are any topics you would like to see covered in future issues.

If you or your colleagues would like to receive *Dechert in Russia* or our other *DechertOnPoints*, please contact Andrew Robinson (+7 499 922 1139; andrew.robinson@dechert.com) or Kieran Morgan (+44 20 7184 7853; kieran.morgan@dechert.com). You can also subscribe at www.dechert.com.

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