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Russian Legal Update

In this issue

The UK Bribery Act (2010): The Impact on Russian Companies and Russian Business Generally

by **Kirill Skopchevskiy**

The UK Bribery Act 2010 (the "Act"), which came into legal effect on July 1, 2010, overhauled the UK's arguably outdated corruption legislation and introduced a tough new regime that in some ways is more stringent and broader than the U.S. Foreign Corrupt Practices Act. The Act's extremely wide extra-territorial effect may result in millions of dollars for international businesses being spent on new control systems and compliance program updates. In this article, we provide a brief overview of the impact of the Act on Russian companies and their businesses, both in Russia and abroad, in light of the Guidance on the defense of adequate procedures, published under Section 9 of the Act by the UK Government on March 30, 2011 (the "Guidance").

The Act covers both the public and private sectors: prohibits facilitation payments, imposes strict liability for worldwide actions of "associated" persons of relevant commercial organizations, and may even impose personal liability on management. The Act prohibits the following offenses:

- an active offense of bribing another person (Section 1);
- a passive offense of being bribed (Section 2);
- an active offense of bribing a foreign public official (Section 6); and
- a strict liability offense where a commercial organization fails to prevent bribery (Section 7).

Why Russian Companies Should Be Concerned

The Section 7 strict liability offense, which has been the focus of much of the commentary on the Act to date, provides that a relevant commercial organization commits an offense if a person associated with it, bribes another intending to obtain or retain business or an advantage in the conduct of business for this commercial organization.

The jurisdictional scope of Section 7 of the Act is exceptionally broad. It applies to a "relevant commercial organization," which is defined in the Act to include:

- companies or partnerships, incorporated or formed in the UK, doing business or part of their business in the UK or elsewhere; and
- companies incorporated or formed outside the UK, carrying on at least part of their business in the UK.

This means that the Act will not only apply to the UK subsidiaries of Russian companies, but also to Russian companies that have, as the Guidance puts it, a "demonstrable business presence" in the UK. What exactly amounts to a "demonstrable business presence" is ultimately a question that only a court would be able to answer in respect of any particular case, but the Guidance suggests using a common sense approach to making this determination. For example, according to the Guidance, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and, therefore, admitted to trading on the London Stock Exchange will not, in itself, mean that the company constitutes a "relevant commercial organization" for the purposes of Section 7. Similarly, a parent company should not fall within the scope of Section 7 just because it has a UK subsidiary, as the subsidiary

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may act independently of its parent or other group companies. Nevertheless, there is still potential for the UK authorities to determine that a UK subsidiary was not independent and its actions were directed by the parent company.

Associated Person

A relevant commercial organization will be liable under Section 7 if a person "associated" with it bribes another person intending to obtain or retain business or a business advantage for the organization. The Guidance acknowledges that in addition to the obvious categories of associated persons such as employees, agents and subsidiaries, contractors and suppliers could also be "associated" persons if they are performing services for an organization, and the question as to whether a person is performing the services for an organization is to be determined by reference to "all the relevant circumstances" and not merely by reference to the nature of the relationship between that person and the organization. It is explicitly stated in the Guidance that the purpose of this broad definition of association is to embrace the whole range of persons connected to an organization who might be capable of committing bribery on the organization's behalf. However, if a contractor is acting merely as the seller of goods, it is unlikely that this contractor will be deemed an "associated" person.

The concept of "associated" persons may become particularly difficult to assess in the context of joint ventures ("JVs"). The Guidance stresses that the Section 7 offense is only committed where the bribing by the "associated" person is done with the intention of obtaining or retaining, for the relevant commercial organization, either business or an advantage in the conduct of business. Therefore, if a JV with participation of a Russian owner operates through a separate legal entity and that entity pays a bribe that is intended to benefit an owner of the JV, the Russian owner may be liable under Section 7 if the JV is performing services for or on behalf of that owner. However, a bribe paid on behalf of a JV entity by one of its employees or agents is unlikely to trigger liability for the owners of the JV, if the JV itself (rather than the owners) was intended to benefit from the bribe. This will be a particularly fact sensitive issue.

Extra-Territorial Application of Section 7

The extra-territorial effect of Section 7 will potentially lead to dramatic consequences for Russian corporations operating abroad. If a Russian company qualifies as a relevant commercial organization for the purposes of Section 7, it will be liable under the Act for the associated person's bribery regardless of the associated person's nationality and regardless of the country where bribery occurred. For example, bribery committed outside the UK by an executive with no connection to the UK could lead to a Section 7 offense on the part of his/her employer because the employer conducts part of its business in the UK. This is so even where the jurisdictional reach of the Act does not extend to the individual in question.

Defense from Strict Liability of Commercial Organizations

The only defense available to a Section 7 prosecution is for the relevant commercial organization to prove that it had "adequate procedures" designed to prevent persons associated with the organization committing bribery.

Adequate procedures are not defined in the Act, but the Guidance sets out the key principles to assist organizations looking to avoid violating the Act. In summary, these principles are the following:

- **Proportionate procedures.** The procedures to prevent bribery should be proportionate to the bribery risks faced by the organization and the nature, scale and complexity of the organization's activities.
- **Top-level commitment.** Senior management should be committed to preventing bribery and a senior person should have overall responsibility for the compliance programme.
- **Risk assessment.** The organization should carry out periodic, informed and documented assessments of its exposure to bribery and take steps to mitigate the risks identified.
- **Due diligence.** Appropriate checks should be carried out on persons performing services for or on behalf of the organization and those persons should in turn be required to carry out similar checks on the persons acting on their behalf.
- **Communication.** Bribery prevention policies should be clearly communicated internally and there should be continuous training.
- **Monitoring and review.** The risks and procedures should be regularly monitored and reviewed.

In order to successfully defend a prosecution, commercial organizations should have procedures in place that are proportionate to their business and their risk profile, but which above all must be "adequate."

Hospitality, Promotional and Other Business Expenditure

The Guidance makes it clear that the Act is not intended to prohibit "reasonable and proportionate" hospitality and promotional or other similar business expenditure intended for these purposes. It is advisable to have transparent internal guidance and an appropriate policy in place to guide employees and directors, particularly in dealing with government officials where no corrupt intent is required under the Act. When assessing corporate hospitality, the following general questions should be considered:

- Is the hospitality offered for a legitimate purpose or is it intended to influence decision making?
- Is the level of hospitality proportionate and therefore considered to be a routine business courtesy, or is it excessive?

If the policy of a commercial organization allows gifts, the organization should specify the permitted levels and maintain a publicly available register of them. Because there is no need for corrupt intent, gifts and entertainment of foreign public officials should be dealt with very carefully. Before any gift is made, it should be considered whether it could be seen to be an "advantage" to the official, which is capable of influencing them to act in a certain way. The safest course of action is to prohibit any such gifts. However, the provision of small value items within nominal limits as set out in corporate policies is unlikely to fall within the remit of the Act. Cash or cash equivalent gifts (including facilitation payments) should be prohibited.

An organization should also have policies and procedures in place to ensure that there is adequate guidance to enable associated persons to know what is acceptable and that there are appropriate procedures for securing approvals and reimbursement, by, for example, including suitable provisions in legal documents binding upon associated persons, requiring them to comply with the organization's anti-bribery policies and to have and implement their own policies with which they must require their own associated persons to comply. There should also be provision for immediate termination of the contract if those requirements are breached.

For a more detailed discussion on practical steps that an organization may take to minimize the risk of being held liable under Section 7, please refer to our article in the April 2011 issue of *DechertOnPoint*.

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Russian Foreign Strategic Investments Law: A Step Forward on the Way to Liberalization or a Decorative Dash?

by **Alexander Egorushkin**

At the Berlin forum of German business leaders held in November 2010, Russian Prime Minister Vladimir Putin declared that the clearance procedure of foreign investments in Russian strategic sectors would be simplified in the near future. Such procedure is governed by Russian Federal Law No. 57-FZ 'On the Procedure for Foreign Investments in Business Entities Having Strategic Significance for State Defense and National Security' (the 'Foreign Strategic Investments Law'). The Foreign Strategic Investments Law has been strongly criticized by foreign investors and Russian business as it creates excessive administrative barriers for investments in Russian businesses which de facto have no social benefits. The Russian Government responded to the criticism by introducing amendments to the law which were adopted by the State Duma in the first reading at the end of March 2011 (the 'Draft Amendments'). In order to come into force, the law would need to pass two more readings to be approved by the Federative Council, being signed into law by the President. This article examines the main changes of the

Amendments and assesses their possible effect on foreign investors.

The Draft Amendments in their current version provide for the following main changes.

Exception for International Financial Institutions

According to the Foreign Strategic Investments Law, acquisitions of more than 25% of Russian companies qualifying as 'strategic' ('Strategic Companies') and more than 5% in Russian Strategic Companies carrying out activities associated with subsoil research and/or the exploration and extraction of certain minerals from federal-level subsoil property ('Strategic Mining Companies') by a foreign state or an international organization are subject to prior consent of the Governmental Commission.

The Draft Amendments introduce an exception to this rule with respect to international financial institutions ("IFIs") in which the Russian Federation participates or with which the Russian Federation has entered into an international agreement. However, this exception does not exclude all IFIs from the scope of the Foreign Strategic Investments Law.

First, under the Draft Amendments, the Russian Government approves the list of such IFIs (the 'List'). The Draft Amendments are silent as to the legal status of those IFIs that the Russian Government does not include in the List. Most likely the exception will only apply to IFIs on the List. Thus, the acquisition of minor stakes of Russian Strategic Companies by IFIs will still be subject to oversight of the Russian government, but the form of such control will change from a formal one-shot clearance as currently envisaged in the Foreign Strategic Investments Law to 'permanent exemption' for IFIs on the List without any clear and formal criteria for initial inclusion therein.

Second, the exception does not affect the general rules of the Foreign Strategic Investments Law which requires approval of the acquisition by a foreign investor of control over a Russian Strategic Company (i.e., more than 50% in Strategic Companies and more than 10% in Strategic Subsoil Companies). Thus, the acquisition of control over Russian Strategic Companies by IFIs must also be cleared by the Governmental Commission under the Foreign Strategic Investments Law.

Transactions Involving Russian Beneficiaries

When the Foreign Strategic Investments Law came into force it was heavily criticized for covering transactions where the acquirer of a Russian Strategic Company is a foreign entity controlled by a Russian beneficiary. While the Draft Amendments were being prepared, Russian government officials declared that the above issue would be addressed. As a result, under the Draft Amendments, the Foreign Strategic Investments Law does not apply to 'relationships related to transactions' between companies 'controlled by the Russian state or Russian individuals who are Russian tax residents.'

Unfortunately, the term 'relationships related to transactions' is not defined and the Draft Amendments do not specify whether only such relationships – but not the transactions themselves – are outside the scope of the Foreign Strategic Investments Law and, if so, what such relationships mean. Neither do the Draft Amendments specify whether simple oral pre-transaction negotiations between parties or written non-binding documents signed by the parties and reflecting their intentions (such as a Memorandum of Understanding qualify as relationships related to transactions).

It also seems clear from the above provision that transactions between a seller having a foreign beneficiary and an acquirer having a Russian beneficiary would still be subject to clearance requirements since these relationships are not only between Russian beneficiaries, as required by the Draft Amendments in order for the exemption to apply.

Finally, it is also not clear whether and how this exemption would apply to transactions between parties controlled by a Russian joint stock company whose shares are dispersed among many shareholders and where no shareholders unilaterally or jointly control such Russian joint stock company. This is because the Draft Amendments refer to companies that are controlled by the Russian state or Russian individuals; which would not apply in such case.

Decreasing the Number of Strategic Activities

The Foreign Strategic Investments Law lists 42 types of strategic activities covered by the law. It is important to note that simply carrying out any such activities is sufficient for a Russian company to be considered as a Strategic Company, regardless of whether or not these are core activities for the company. Due to such a formal approach, many Russian companies are considered Strategic Companies simply because their ancillary activities are on the list of strategic activities set out in the Foreign Strategic Investments Law. For example, many banks involved in encryption activities are

regarded as Strategic Companies under the Foreign Strategic Investments Law. However, these encryption activities are carried out by banks for the purpose of ensuring the safety and security of their clients' personal data, not as a core profit-generating activity.

The Draft Amendments propose to exclude from the list of strategic activities the following activities, which can hardly be regarded as having strategic importance for state defense and national security:

(i) encryption activities carried out by a private bank (does not apply to banks in which the Russian state holds any stake);

(ii) activities related to the use of agents of infection belonging to the fourth pathogen group (i.e., an organism that is highly unlikely to cause human disease); and

(iii) the placement, construction, operation and decommissioning of nuclear plants, radiation sources, and nuclear material and radioactive substance storage facilities, or radioactive waste storage sites that belong to the fourth radiation hazard category (i.e., in the event of an accident any radioactive effect wuld be limited to the room where it occured).

Additional Issuance of Shares in Strategic Subsoil Companies

According to the current version of the Foreign Strategic Investments Law, any acquisition by a foreign investor of shares in a Strategic Subsoil Company resulting in 10% of the shares in such a company being held by a foreign party must be cleared by the Governmental Commission. Based on the literal interpretation of this rule, arguably, even if a foreign shareholder which already holds more than 10% of the shares in a Strategic Subsoil Company acquires more shares in such company as a result of an additional issuance of shares while its shareholding percentage remains unchanged or even decreases but does not fall below 10%, then such an acquisition is still subject to the clearance requirements under the Foreign Strategic Investments Law.

The Draft Amendments address this issue by providing that clearance requirements do not apply to the acquisition of shares in Strategic Subsoil Companies if the percentage share does not increase.

Procedural changes

The Draft Amendments also slightly change the clearance procedure. For example, it is proposed that apart from the Russian Federal Security Service (FSB) the Ministry of Defense of the Russian Federation will also be involved in the review process. In addition, detailed regulation will be introduced with respect to entering into an agreement setting out the acquirer's obligations related to the clearance.

In summary, the Draft Amendments introduce largely technical changes. Unfortunately, the Draft Amendments are rather poorly drafted and raise more questions than provide answers. Hopefully, the language will be improved in the second and the third readings. The Draft Amendments are anticipated to be adopted sometime during the late fall of 2011 and to come into force in the beginning of 2012.

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Russia Keen to Attract Highly Qualified Foreign Nationals and Ease the Visa Regime

by **Tatiana Kozlova**

In the Second Quarter 2011 edition of the *Russian Legal Update*, we analyzed in detail the recent amendments to Russia's immigration laws (the "Immigration Amendments"). As a result of the Immigration Amendments, highly skilled foreign professionals in Russia are gaining a multitude of benefits, making working and living in Russia more foreigner-friendly. These Immigration Amendments have positively impacted Russian immigration rules for foreigners, notably restoring the right of employers to register foreign nationals and report their travels to, from and within Russia, and extending registration deadlines for foreign nationals.

The Russian government is now taking further steps to implement the Immigration Amendments. In particular, Resolution No. 654, dated August 4, 2011 (the "Resolution") and based on the Immigration Amendments, introduced some revisions to the Rules on Immigration Registration of Foreign Citizens and Stateless Persons in the RF. An important revision is that highly skilled foreign professionals and members of their families will not

have to seek registration for 90 days from their arrival in Russia. If they are already registered, they will also be exempt from registering for 30 days from their arrival in a new place of residence. After the newly allotted period expires, the specialists and their families must be registered within seven days. The Resolution was published on August 8, 2011, and came into force on August 15, 2011.

Russia is keen to attract foreign talent and investment and is taking significant, real steps to communicate its goal. Recently, a lot of media attention has been focused on bilateral cooperation agreements, which promise to reduce the time and cost of obtaining visas and extending the term of visas up to three years (in the case of the United States) or up to five years in the case of the EU. The current proposal is to have these agreements signed by the RF and the United States and the RF and European countries before the end of 2011.

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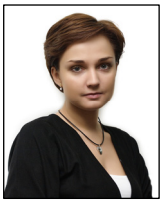
Russian Government Reclassifies Beer as an Alcoholic Beverage




by **Svetlana Kuzovkova** and **Irina Kulyba**

Until recently, beer has not been considered an alcoholic beverage in need of strict regulation, allowing it to gain market share across Russia, with sales supplanting bottled water and juice. The dynamic Russian beer market consequently attracted many large beer producers to Russia. However, recent amendments to the law have reclassified beer as an alcoholic beverage, which may significantly affect the market.

Federal Law No. 218-FZ of July 18, 2011 "On the Amendments to the Federal Law on the State Regulation of Production and Circulation of Ethyl Alcohol, Alcoholic and Alcohol-Containing Products and Individual Legislative Acts of the Russian Federation and Invalidation of the Federal Law on Restrictions of Retail Sale and Consumption (Drinking) of Beer and Drinks Made on Its Basis" (the "Alcohol Amendment Law") came into effect on July 22, 2011, except for several provisions that will gradually come into effect on January 1, 2012, July 1, 2012 and January 1, 2013. The Law was prepared as part of the state's policy to curb alcohol abuse and prevent alcoholism.

Under the provisions of the Alcohol Amendment Law, beer and beverages produced on the basis of beer (the "Malt Beverages") are now classified in the same category as alcoholic beverages and fall within the scope of Federal Law No. 171-FZ, dated November 22, 1995 "On State Regulation of Production and Circulation of Ethyl Alcohol, Alcoholic and Alcohol-Containing Products" (the "Alcohol Law").

In accordance with the Alcohol Amendment Law, the sale of alcoholic beverages is prohibited at petrol stations; wholesale and retail markets; all public transportation stations, which includes railway stations and airports (except for duty-free shops); and other public places determined by the Russian government, including areas surrounding these locations.

Based on the Alcohol Amendment Law, in order to obtain a license for the retail sale of alcoholic beverages, the applicant must submit documents confirming title, the full right of use, the operational right, or a leasehold right (based on a lease agreement for the term of one year or more) of a stationary trading space and warehouse with the licensing authority.

According to the Alcohol Amendment Law, it is prohibited to consume alcoholic beverages in and/or near and around:

- children's, educational, medical and sports facilities, including the surrounding area;
- mobile retail outlets; and
- other public places, including courtyards, parks, squares, beaches, etc., except for catered public events.

Consumption (drinking) of alcoholic beverages by minors (under 18 years old) is also prohibited.

Once the Alcohol Amendment Law comes into force it is expected to stabilize alcohol production, sale and consumption in Russia. The focus of the Alcohol Amendment Law is to increase the oversight over the economic interests of consumers; control production and sale (wholesale and retail sale) of alcoholic products in Russia; increase the quality of the alcohol products produced, including beer and related (malted) drinks; decrease the sale of

counterfeit alcohol; and decrease alcohol consumption, which is currently approximately 11.7 liters per head (for liquor) and 71.2 liters per head for beer.[1]

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Russian Customs Authorities to Reimburse Expenses to Importers for Unjustified Retention of Goods in Temporary Storage Warehouses

by **Timur Djabbarov**

Russian customs law provides that if the customs authorities suspect a violation of import regulations, they are entitled to impound the goods and place them in a temporary storage warehouse.[2] The storage is maintained at the importer's expense at the cost (tariff) in force for the period of storage as set out in the public offer made by the warehouse owner or stated in the contract for storage of goods made between the representative of the customs authorities and the warehouse owner.

Attributing the storage costs to the importer seems fair if the importer's violation is proven during the customs inspection or by subsequent court proceedings. However, if no violation is found, until now the importer has only been entitled to claim the reimbursement of its expenses for this storage by separate litigation against the customs authorities. This litigation and further enforcement procedures are time-consuming and expensive.[3]

In order to simplify the reimbursement procedure, on August 19, 2011, the Government of the Russian Federation issued Decree No. 704, by which it approved the Provision on customs authorities' reimbursement of expenses (hereinafter, the "Provision"). Subject to Clause 2 of the Provision, reimbursement of an importer's storage costs must be paid in full from the federal budget if the customs inspection of these goods finds no violation of the laws of the Customs Union[4] and/or the customs law of the Russian Federation.

The reimbursement must be made on a non-judicial basis in response to the importer's application. Should the customs authorities find the application reasonable, the importer will receive reimbursement through a bank transfer within 45 days from the date of submitting the application.

The Decree came into force on September 26, 2011.

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New Legislation Bolsters Shareholders' Rights to Information and Extends the Terms for Shareholders' Meetings

by **Evgenia Korotkova** and **Andrey Dukhin**

Recent draft amendments to the Law on Joint-Stock Companies (the "JSC Law") propose to increase the information that a joint stock company ("JSC") must provide to its shareholders when requested and extends the terms for holding extraordinary shareholders' meetings. The most significant proposed change is the obligation of the JSC to provide its shareholders with documents on companies controlled by the JSC directly or indirectly subject to the commercial secrecy regime.

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1 U.S.-Russia Business Council Daily Update, August 19, 2011

2 Subject to Article 168 of Federal Law No. 311-FZ, dated November 27, 2010 "On Customs Regulation in the Russian Federation."

3 Russian courts routinely deny compensation of legal fees exceeding $2000 - $3000.

4 The Customs Union ("CU") is contracted between Russia, Kazakhstan and Belarus on the basis of the trilateral Treaty of October 6, 2007. CU means a single customs territory, unified customs rules, flat duty rates, no control within borders, etc.

The proposed amendments to the JSC Law were adopted by the RF State Duma on June 6, 2011, in its first reading (the "Draft Law"). The Draft Law may be further amended by the upper house before it is signed into law.

Additional Information to be Provided to Shareholders under the Commercial Secret Regime

The Draft Law grants shareholders access to documents concerning companies that are either directly or indirectly controlled by the JSC. However, access to accounting documents and the minutes of the executive body of the JSC can only be provided to those shareholders who hold not less than 25% of the shares in the JSC. The proposed modification is intended to prevent situations in which a JSC transfers its business activity to company(ies) under its control in order to conceal the status of its activities from its shareholders.

An extended list of information to be kept by the JSC and to be provided to its shareholders also includes the following:

- contracts concluded with the registrar of the JSC, its auditor, managing company or manager;
- contracts that are subject to approval by the JSC, such as major and interested party transactions;
- contracts under which an entity is able to influence decisions made by the JSC or under which the JSC is able to influence a decision of another entity; and
- contracts that contain mandatory instructions to the JSC from its parent company, and contracts concluded by a JSC for the purpose of fulfilling such instructions.

The Draft Law also proposes a commercial secrecy regime for shareholders obtaining information. Categorizing information as a commercial secret in order to avoid providing such information to shareholders has been a popular means of denying shareholders important information. The Draft Law addresses this issue by allowing shareholders access to information deemed to contain commercial secrets, provided that the shareholders sign an acknowledgement letter to comply with the commercial secrecy regime.

In order to impose liability on a shareholder who breaches the secrecy acknowledgment, the JSC must establish an internal commercial secrecy regime in accordance with Section 10 of the Federal Law "On Commercial Secrets," No. 98-FZ, dated July 29, 2004 (as amended).

Extension of Terms for Holding Extraordinary Shareholders' Meetings and Other Important Modifications

The Draft Law also provides new time requirements extending the notice period for holding shareholders' meetings, as follows:

- from 40 to 70 days (after a request for the meeting has been made) for holding a shareholders' meeting convened at the request of an internal audit commission (auditor), external auditor of the JSC, or a shareholder(s) holding not less than 10% of the voting shares of the JSC;
- from 70 to 105 days (after a request for the meeting has been made) for holding a meeting if the proposed agenda of an extraordinary shareholders' meeting includes a question on electing members of the board of directors of the JSC;
- from 40 to 65 days (after a decision to convene has been adopted) for holding a shareholders' meeting where the board of directors is obligated to adopt a decision to convene an extraordinary shareholders' meeting (where a shorter term is not provided by the charter of the JSC);
- from 90 to 100 days (after a decision to convene has been adopted) for holding a shareholders' meeting where the board of directors has convened an extraordinary shareholders' meeting to elect members of the board of directors of the JSC (where a shorter term is not provided by the charter of the JSC).

The Draft Law also sets a five day deadline before the meeting for providing information relating to holding shareholders' meetings to the shareholders that are entitled to participate in such meetings. There is no such deadline in the current JSC Law.

Special Auditor

Another new provision proposed in the Draft Law allows a shareholder(s) of a JSC, holding not less than 10% of the share capital, to appoint a special

auditor to conduct an extraordinary audit on the financial standing of the JSC and its accounts.

This provision appears to have been introduced to clarify a discrepancy between the JSC Law and Section 103(5) of the RF Civil Code, which permits a 10% shareholder to call an extraordinary meeting.

The Draft Law provides that a JSC must reimburse the shareholder for the services of the special auditor.

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Russian State Commercial (*Arbitrazh*) Courts Lose Monopoly on Real Estate Disputes

by **Timur Djabbarov**

Certain provisions of Russian law imply that real estate disputes may be the subject of arbitration; however, none explicitly allow for such a possibility. The Supreme Commercial (*Arbitrazh*) Court of the Russian Federation (the "RF Supreme Commercial Court")[5] has taken the position for more than six years that disputes concerning real estate may only be heard by Russian state commercial (*arbitrazh*) courts. The court's approach was based on the rules requiring public control over real estate through mandatory registration of titles and/or transactions by state authorities.[6] As a result, Russian state commercial (*arbitrazh*) courts have enjoyed a monopoly on hearing real estate disputes and denied enforcement of awards of arbitral (*treteiskiy*) courts and tribunals on such matters.[7]

In a spring 2011 case disputing the execution of a Russian domestic arbitral court decision on the foreclosure of pledged (mortgaged) real estate, the RF Supreme Commercial Court appealed to the Constitutional Court of the Russian Federation (the "RF Constitutional Court") requesting that it rule on the constitutionality of the provisions of several Russian laws permitting real estate disputes to be submitted to arbitration. By means of Resolution No. 10-P, dated May 26, 2011, the RF Constitutional Court ruled that the disputed provisions of the Russian laws at issue comply with the Russian Constitution and that disputes on real estate located in Russia may in fact be subject to arbitration.[8]

The Constitutional Court noted that the state registration of rights to real estate, which provides public assurance of transparency and authenticity of real estate transactions, does not actually change the nature of civil relations with regard to real estate. Accordingly, the registration requirement does not preclude the possibility of real estate disputes being considered by arbitral panels and tribunals.

This position of the Constitutional Court is also fully applicable to real estate disputes involving foreign entities. The exclusive jurisdiction of commercial (arbitrazh) courts[9] over such disputes bans agreements on change of venue, but does not prevent parties from using arbitral tribunals.

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5 The RF Supreme Commercial Court is the highest state commercial (*arbitrazh*) court of the RF. Commercial arbitrazh courts hear economic disputes between legal entities and/or individual entrepreneurs. The Russian term "Arbitrazh" should not be confused with the English term "arbitral." Arbitration (as opposed to commercial) courts in Russia are called "*treteiskie sudi*."

6 See Clause 27 of Information Letter No. 96 of the Presidium of the RF Supreme Commercial Court, dated December 22, 2005; Resolution No. 17373/08 of the RF Supreme Commercial Court, dated May 12, 2009.

7 The arbitration court may independently decide on its own competence to hear a case on the basis of an agreement which provides for arbitration, but its final award requires enforcement through an order of the state commercial (*arbitrazh*) court.

8 Although the particular case concerned domestic arbitration courts of the RF, we understand that the position of the RF Constitutional Court is also applicable to international arbitration forums.

9 See Chapter 32 of the Commercial (Arbitrazh) Procedure Code of the Russian Federation "Competence Regarding the Hearing of Cases Involving Foreign Entities".

The Resolution of the Constitutional Court is final, direct and binding for all entities and state authorities.[10] This means that a state commercial (arbitrazh) court can no longer deny the enforcement of an arbitration award issued in a real estate dispute on the grounds of improper venue.

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Recent Developments in Licensing Regulations Establish a More User-Friendly/Transparent Regime*

by **Evgenia Gaysinskaya**

New licensing regulations are intended to make the licensing regime more systematized and transparent, significantly reducing the number of licensable activities and clearly outlining the process of acquiring a license and licensing control.

Licensing regulations have undergone major changes. New Federal Law No.99-FZ "On the Licensing of Certain Activities" was adopted on May 4, 2011 ("New Licensing Law").

Certain provisions of the New Licensing Law entered into force on May 6, 2011 (i.e., the definition of licensing requirements and the cancellation of a license as grounds for refusal to grant a new license). Licensing control provisions came into effect on July 1, 2011, but the majority of the provisions of the New Licensing Law will come into force on November 3, 2011.

When all of the provisions of the New Licensing Law enter into force, it will supplant the current Federal Law No.128-FZ "On the Licensing of Certain Activities," dated August 8, 2001 (as amended) ("Current Licensing Law"), and licensing regulations will change significantly as a result of the amendments outlined below.

Reducing the Number of Licenses

Certain types of activities will no longer require a license, in particular:

- manufacturing prosthetic and orthopedic equipment;
- production and sale of special gaming equipment;
- ensuring aviation security; and
- manufacturing, repairing, measuring, exhibiting or collecting weapons.

Other activities will be covered by a single license, in particular:

- developing, producing, testing or repairing aircraft; and
- developing, producing, testing, installing, mounting, maintaining, repairing, recovering or selling weapons and military equipment.

At the same time, certain types of licenses for activities will be gradually phased out, in particular:

- producing and maintaining medical equipment will no longer require a license as of the effective date of the special technical regulations;
- industrial safety equipment will no longer require a license as of the introduction of accreditation and/or self-policing mechanisms; and
- licensing of inland water and overseas transportation of dangerous cargo, loading, and unloading of dangerous cargo on inland water, marine, and railway transport will no longer be required once the law establishing compulsory insurance of civil liability takes effect.

The New Licensing Law establishes a perpetual licensing regime, whereas the Current Licensing Law sets out a five-year term for licenses. In terms of licenses issued before the New Licensing Law came into effect, a new license will be issued to the licensee after it expires if the description of the licensed activity has changed. Other licenses issued before the effective date of the New Licensing Law shall be deemed issued without a fixed term (assuming that licenses can be suspended or

[10] Articles 6 and 79 of Federal Constitutional Law No. 1-FKZ "On the Constitutional Court of the Russian Federation," dated July 21, 1994.

terminated in the event of uncovered violations based on the grounds provided by Russian law).

Uniform Procedure for Issuing Licenses

The New Licensing Law sets out one standard procedure instead of the two procedures used under the Current Licensing Law: standard and simplified.

Currently, obtaining a license via the simplified procedure is open to companies that engage in high risk activities including a high degree of potential liability, e.g., cargo transportation, loading, and unloading.

The applicant must insure its own civil liability or obtain a certificate stating that its activity complies with international standards in order to obtain a license via the simplified procedure. In return, license holders receive certain preferential treatment, such as exemption from being examined for compliance with licensing requirements and scheduled inspections.

Under the New Licensing Law, the simplified procedure will no longer apply.

Licensing Control

The procedures of licensing control are described in the New Licensing Law more clearly and in greater detail. The new rules of control came into force July 1, 2011. Licensing authorities must comply with licensing control policies outlined in both the New Licensing Law and Federal Law No.294-FZ "On the Protection of Legal Entities' and Individual Entrepreneurs' Rights During Conducting State and Municipal Control (Supervision)," dated December 26, 2008.

The New Licensing Law allows for inspections of license and relicensing applicants, as well as license holders. In the case of applicants for new or renewal of licenses, authorities are permitted to conduct documentary and unscheduled onsite inspections without the consent of prosecutors in order to check the information provided to the licensing authorities.

Once a license has been issued, the licensing authorities have the right to carry out documentary, scheduled and unscheduled onsite inspections.

Scheduled inspections are to be conducted one year after licensing, and every three years thereafter.

Unscheduled onsite inspections can be conducted solely on the following grounds:

- expiration of the term of the prescription for amending licensing violations, issued by the licensing authority;
- if the licensing authority receives information from a reliable outside source on gross violations of the licensing requirements by the license holder (the list of such grounds is to be set forth in regulations on licensing of the specific activity);
- expiration of the term of a license suspension;
- at the request of the licensee for the licensing authority, in case of early fulfillment of the prescription for amending licensing violations, issued by the licensing authority; or
- at the request of the RF President or the RF Government for the licensing authority to carry out an inspection.

Unscheduled onsite inspections can be conducted without the consent of prosecution authorities, but with advance notice to the licensee. This rule has only one exception—if the licensing authority receives information from an outside source on gross violations of the licensing requirements by the license holder. Such an inspection can be conducted only with the approval of the prosecutors, but without notification of the licensee.

It should also be noted that as of July 1, 2012, licensing authorities will have the right to use information from the Internet for the purpose of licensing control.

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* *Elvira Danilova assisted in writing this article*

Recent News

Recent Promotions/Arrivals

June 16, 2011: Elvira Danilova joined the Moscow office as a paralegal in the Corporate and Securities Group. Elvira is a graduate of Moscow State University.

August 23, 2011: Andrey Dukhin joined the Moscow office as an associate in the Corporate and Securities Group. Andrey previously worked as a

finance associate in the Moscow and London offices of an international law firm. He is a graduate of the Moscow State Institute of International Relations and is currently completing his LL.M. in Commercial Law at the City University of London with anticipated graduation in 2012.

Recent Major Deals

Dechert represented Janssen Pharmaceutica NV and Johnson & Johnson LLC on their cooperation agreement with the Skolkovo Foundation, a nonprofit organization in Russia, with the goal of supporting the development of socially useful scientific innovations through venture capital investments and establishing a center for high technology and continuous medical education in Russia. We also represented Janssen Pharmaceutica NV on its co-investment agreement with ChemRar, an incubator of high-tech innovative pharma and biotechnology companies in Russia, to explore funding Russian start-up companies engaged in research in the fields of biotechnology and medical devices.

The Dechert team was led by Kristopher D. Brown (partner, New York, corporate and securities) and Laura M. Brank (managing partner, Moscow, corporate and securities) and included Edward P. Lemanowicz (partner, Philadelphia, tax), Evgenia Korotkova (national partner, Moscow, corporate and securities), Kirill Skopchevskiy (associate, Moscow, corporate and securities) and Lorenzo Ruiz de Velasco (associate, New York, corporate and securities).

Among other honors, Dechert was ranked among the leading firms worldwide for Life Sciences by *Chambers Global* (2011) and for telecommunications, media and technology in Russia by *The Legal 500 EMEA* (2011), which noted the client citations that "Dechert Russia LLC's 'advice is very appropriate, commercially targeted and great value for money'" and that "the TMT group 'compares very favorably to the rest of the market in terms of orientation for business needs.'" Lawyers in Dechert's Moscow office have worked on more than 20 matters in the TMT and life sciences sectors in the last 12 months.

Recent Dispute Resolution

Dechert successfully represented a Canadian aerospace and transportation company in Russian court, closing a dispute regarding aircraft delivery that was opened in 2003. The Dechert team was led by Ivan N. Marisin (partner, Moscow, dispute resolution) and included Vasily Kuznetsov (national partner, Moscow, dispute resolution), Alexander Sidorov (associate, Moscow, dispute resolution), and Vitaliy Skibin (associate, Moscow, dispute resolution).

Recent/Upcoming Events, Seminars and Speaking Engagements

August 16, 2011: Laura Brank was featured in a video titled "Russian Dealmaking Heats Up" for *The Deal*. The video may be viewed on the Dechert web site at: http://www.dechert.com/videos/.

September 21, 2011: Ivan Marisin gave a presentation titled "Enforcing Arbitral Awards in Russia" at the ICC UK Arbitration Conference in London.

October 28, 2011: Laura Brank will present on "Investing in Russia – Minimizing the Legal Risks" at the Russia Business and Investment Summit at the New York Stock Exchange.

November 29-30, 2011: Shane DeBeer will attend Informa's 7th Annual Arctic Oil & Gas Conference at the Clarion Hotel Royal Christiania, Oslo.

Recent Third-Party Articles

Igor Panshensky authored an article titled "К вопросу о селективной дистрибуций: дело «Ново Нордиск»" ("Challenges of Selective Distribution: the Novo Nordisk Case") that appeared in the August 2011 print and online editions of ***Корпоративный Юрист*** (*Corporate Counsel*).

Recent Appointments

Oxana Peters was selected to head the Dispute Resolution Work Group by the Legal Committee of the Russo-German Chamber of Commerce.

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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's *Russian Legal Update*, other *DechertOnPoints*, or copies of the articles or presentations referred to herein, please contact Anastasiya Shaposhnik (+7 499 922 1163; anastasiya.shaposhnik@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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