Overview of amendments to Russian legislation

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Changes to Russian strategic legislation

Federal Law No. 57-FZ “On the Procedure of Foreign Investment in Companies Having Strategic Importance for National Defence and State Security” (as amended) (the Strategic Law) was recently amended.

The list of activities considered of strategic importance for national defence and state security has been extended and now includes rendering services in Russian ports. Further, the amendments specified the criteria for rendering printed press activities strategic.

As a result of amendments the Strategic Law requirements now apply not only to the acquisition of shares in a Russian strategic company, but also to the acquisition of fixed production assets the value of which equals 25% or more of the balance value of the company’s assets.

The amendments provide for a possibility to extend the term of the earlier issued consent of the Russian government for the transaction leading to establishment of control over a strategic company.

In addition, a new requirement has been introduced for where a person in whose favour that consent was issued is now obliged to notify the state authorities on the completion of the relevant transaction.

The amendments clarified the issue with the application of the requirements of the Strategic Law to transactions in relation to strategic entities between companies whose ultimate beneficiaries are Russia or Russian citizens. Previously the law provided that both the seller and the purchaser under these transactions had to be controlled by Russia or be both Russian citizens and Russian tax residents to enjoy the exception from the Strategic Law requirements. Now the law states that the relevant exception applies to situations where only the purchaser is a company controlled by Russia, a Russian constituent entity or a Russian citizen being Russian tax resident.

A number of amendments apply to strategic companies in the sphere of subsoil use. The most notable amendments are:

1. The easing of the requirements for foreign investors who already own 75% of shares in a Russian subsoil strategic company. These foreign investors no longer need to obtain the prior approval of the Russian government to increase their shares up to 100%.

2. The rules on the application of the exception set out in the Strategic Law with regard to subsoil strategic
Recent changes to Russian subsoil legislation

Law No. 2395-1 "On Subsoil" dated 21 February 1992 (as amended) (the Subsoil Law) has been recently amended.

The most important changes include the following:

1. Before the amendments were introduced, the Subsoil Law required the completion of exploration (prospecting and evaluation) in relation to the entire licensed area of federally significant subsoil plots (as defined by article 2.1 of the Subsoil Law) before the rights for the detailed exploration and production could be granted to the licence holder by the Russian government and this rule applied to all subsoil users whether controlled by foreign investors or not.

Now, the subsoil user can carry out exploration (prospecting and evaluation) within the federally significant subsoil area at any stage of development of that area, i.e. during the detailed exploration and production stages provided such subsoil user is not a foreign investor or a legal entity controlled by a foreign investor.

Similarly, the requirement to obtain the Russian government’s consent to carry out the detailed exploration and production within the federally significant subsoil plot applies only to subsoil users who are foreign investor or controlled by foreign investors, while previously this rule applied to all subsoil users.

2. The Subsoil Law now provides for the possibility to rectify errors, typos and other mistakes made in the process of the issuance or reissuance of subsoil use licences, including mistakes made in respect of the boundaries (geographic coordinates) of the subsoil plots. These rectifications can be made either pursuant to an application by the subsoil user or upon the licensing authorities’ initiative if they identify the relevant mistakes themselves.

It appears that such rectification will be qualified and formalised as addendum to the subsoil use licence.

Strategic companies: New regulations for bank accounts

Federal Law No. 213-FZ (Law 213-FZ) introduced new regulations for bank accounts of strategically important companies to the defence industry complex and safety of the Russian Federation (strategic companies). The law also applies to companies under the direct and indirect control of the strategic companies.

According to Law 213-FZ, the number of lending institutions in which the strategic companies may carry out certain banking operations, such as, the opening of accounts and paid letters of credit, the opening of bank deposits and the acquisition of securities, is limited. Strategic companies may establish relations to carry out the relevant operations only with the following lending institutions:

1. Lenders that have the amount of internal funds exceeding the minimum established by the Russian government coordinated with the Central Bank of the Russian Federation;
2. Lenders under the direct or indirect control of the Russian Federation or the Central Bank of the Russian Federation (the Central Bank);
3. Vnesheconombank; and
4. Other lending organisations defined by the Russian government.

The list of these lenders (List) is published on the Central Bank’s website.

If a lender does not meet the above requirements, then the strategic company is obliged to close its bank account contract with that lender within one year after the publication of the above List on the Internet.

Russia’s Highest Arbitration Court made a ruling on termination of contracts which are subject to state registration

In accordance with Russian legislation, certain types of agreements (e.g., agreements on the lease of buildings/constructions concluded for 1 year or more, agreements on the sale of enterprises, etc.) are subject to the state registration by the authorized Russian state authority.

An assembly of Russia’s Highest Arbitration Court issued decree No. 35 "On the Consequences of the Termination of a Contract" which, inter alia, sets out the actions which parties wanting to terminate a contract which is subject to state registration should take to unilaterally terminate it. Where a contract provides a party with a right to refuse to perform its obligations under the contract without cause, then that party can unilaterally file the termination of the contract with the registration authority. The applicant should provide the registration authorities with evidence that the other party has been notified of its refusal to perform its obligations under the contract.
Where an application has been made to unilaterally terminate a contract is in relation to, inter alia, breach of contract, or any circumstances which are subject to additional examination, then both parties to the contract should file their respective application with the registration authority. If the other party refuses to file an application, then the party which declared its refusal to perform the contract is entitled to file a claim with the court to have the contract declared terminated. The court’s decision on the contract’s termination shall be sufficient grounds for the registration authority to enter the relevant termination record into the register.

*Note: We note that as a result of the recent merger of the Supreme Court with the Highest Arbitration Court of Russia the latter was abolished. However, all the decrees issued by the Highest Arbitration Court of Russia are valid until they are amended by the assembly of the Supreme Court of Russia.*

**Highest Arbitration Court spoke on certain issues of challenging major and interested party transactions**

As a general rule, major transactions (i.e., transactions with the value exceeding certain threshold established by the law) and transactions between interested parties (interested party transactions) transactions require preliminary corporate approval of the authorized management bodies of the parties to such transactions. An assembly of Russia’s Highest Arbitration Court in its Decree No. 28 “On certain issues connected with the challenging of major and interested party transactions” (the Decree) ruled, inter alia, on new grounds for challenging such transactions.

As a result, the major/interested party transaction which was made to the detriment of a company’s own interests (Art. 174.2 of the Russian Civil Code) can be deemed invalid by the court even if there has been a decision by the general meeting of participants or shareholders on its approval. In order for the transaction to be deemed invalid, it must be proved that the counterparty knew or should have known about the obvious damage to the company, or other existing circumstances evidenced by the presence of secret agreements or other joint actions of the representative of the company or its management body and the counterparty to the transaction.

The “obvious damage” to a company is present when, for example, the transaction is made on the knowingly unfavourable terms, e.g. when the consideration received by the company is two or more times lower than the cost of the goods/benefits it has transferred to the counterparty, etc. The counterparty is deemed to have known about the existence of the obvious damage where such damage should have been clear to any ordinary reasonable counterparty at the moment of conclusion of the transaction.

Even if corporate approval for the major/interested party transaction was required but was not obtained, the transaction can still be deemed valid in court provided that certain circumstances exist, for example, where the counterparty to the transaction did not know and could not have known that its performance was in breach of legal requirements. However, the Decree specifies that one of the most commonly used contractual warranties - that is where a company’s representative represents that all corporate procedures have been complied with at the time of performance of the transaction - is an insufficient ground for concluding that the counterparty to the transaction was acting in good faith.

Finally, the Decree has touched upon the issue of the “transactions made in the course of ordinary business activities”. It is known that the corporate approval of the company’s management bodies for those transactions which are considered as being major or interested party transactions is generally not required. However, the Decree stipulates that the mere fact of that a company’s primary activity has been entered into the Unified State Register of Legal Entities or its charter or that a company has a licence to carry out that activity at the conclusion of a transaction is not enough to deem that transaction as one which was made in the ordinary course of business, and, therefore, is not enough to exclude the requirement to get corporate approval for such a transaction.

*Note: We note that as a result of the recent merger of the Supreme Court with the Highest Arbitration Court of Russia the latter was abolished. However, all the decrees issued by the Highest Arbitration Court of Russia are valid until they are amended by the assembly of the Supreme Court of Russia.*

**The Arbitration court of Moscow City decision on OJSC JSOC “Bashneft” share repossession case**

On 7 November 2014, the Arbitration court of the Moscow city issued a widely debated decision stating that over 70% of OJSC JSOC “Bashneft” shares owned by the Russian Federation are to be repossessed from OJSC JSFC “Sistema” and CJSC “Sistema-Invest”. The decision came into force on 8 December 2014.

Since the respective shares were considered to be privatised in the early 2000s, the court’s reasoning in making their decision that 70% of the shares were still owned by the state after such a long period of time brought some debate as to Russian court practice.

Thus, despite the aim of the recent amendments to the Civil Code which were presumed, inter alia, to establish a general maximum length for the limitation of actions period (ten years starting from the date of the activity), there is some doubt as to whether the recent amendments to the Civil Code have had a practical effect on the Russian court practice.
violation of the right), the Arbitration court ruled that such tool may not be used as a means for the legalisation of seizure of assets which were illegally obtained.

Attention should be brought as well to the newly increased powers of the Public Prosecutor Office of the Russian Federation under the Arbitration Procedural Code that have made the claim possible. By means of the Federal Law dated 28 June 2014 No. 186-FZ “On the Amendments to the Arbitration Procedural Code of the Russian Federation”, the prosecutors were entitled to submit claims for the repossession of state and municipal property from the illegal third party currently in possession.

**Acceleration of Russian citizens’ personal data localization requirement**

Russian legislators have accelerated the introduction of the requirement for the localisation of personal data. Under the localisation requirement an operator while collecting personal data must ensure the recording, systematisation, accumulation, storage, rectification (update, change) and extraction of Russian citizens’ personal data using databases located in Russia. This requirement was initially introduced in July 2014 and was set to become effective on 1 September 2016. However, shortly after its introduction certain state officials claimed it should apply from the beginning of 2015; but for the majority of businesses this would be impossible to achieve and the new deadline was set for 1 September 2015.

There are some statutory exceptions to the above localization requirement, including: the processing of personal data for the purposes set out in an international treaty which the Russian Federation is a party to or in the law or for the performance of functions, rights and obligations that are imposed on the operator by Russian legislation.

Failure to comply with the requirement may result in a number of negative consequences for an operator, including the right of the Federal Service for Supervision in the Sphere of Communications, Information Technology and Mass Communications (Roscomnadzor) to seek the termination of the operator’s ability to utilise hosting and/or communication services.

**Changes to Russian currency legislation**

Amendments to Federal Law No. 173-FZ On Currency Regulation and Currency Control introduced additional exemptions from the requirement for Russian residents to have Russian and foreign currency received in the course of foreign trading credited to their accounts with authorised banks (i.e. Russian banks licensed to carry out operations with foreign currency).

The above exemption now also applies to the following cases:

- set off claims arising from obligations based on agreements between Russian residents exporting natural gas in gaseous form and foreign residents purchasing that gas; and
- set off claims arising from obligations based on agreements for providing foreign residents’ obligations with regard to Russian residents exporting natural gas in gaseous form in relation to the transportation of that gas within the territories of foreign countries.

**New regulations on secondment**

Amendments to several legal acts, including the Labour Code, Employment Law, and Tax Code have been introduced by Federal Law No 116-FZ (Law 116-FZ or the Law), which will be enacted in January 2016.

Law 116-FZ clarifies the situation with secondments in Russia, which was not very clear before its enactment. The Law directly prohibits rented labour, which is defined as the labour of an employee pursuant to the order of his/her employer in the interest, and under the authority and control of the individual or legal entity who/which is not his/her employer.

At the same time, Law 116-FZ provides for two cases where the temporary rent of employees is possible.

First, is the outsourcing of personnel by private recruitment agencies. Law 116-FZ regulates the details of such outsourcing, including, the conditions of the labour contracts with personnel, the parties’ responsibilities, and specifics on the transfer of certain categories of personnel (for example, students). Law 116-FZ requires private recruitment agencies to undergo the process of special accreditation.

Second, is the temporary transfer/secondment by a company-employer (which is not a private recruitment agency) of its personnel: (1) to its affiliated company; (2) to a joint stock company where the employer is a party to a shareholders’ agreement in relation to such joint stock company; and (3) to a company which is a party to a shareholders’ agreement with an employer.

Law 116-FZ provides that more detailed rules for secondment will be established by specific legislation which has yet to be adopted.