

Russia

Gas Export

On 18 July 2006 the President signed Federal Law No. 117-FZ "On the Export of Gas."

Pursuant to the Law the owner of the Unified Gas Supply System (Gazprom) or its fully owned subsidiary (Gazexport) shall have exclusive rights to export gas.

Pursuant to the law, the owner of the Unified Gas Supply System (Gazprom) or its wholly owned subsidiary (Gazexport) shall have exclusive export rights to export gas outside the Russian Federation. The law covers both the export of gas in gaseous form as well as in the form of LNG. The law will not apply to the export of gas produced in accordance with the PSAs that were entered into prior to the entry into force of this draft law.

The Law will come into force on 30 July 2006.

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Dangerous industrial objects

On 14 July 2006 the Government issued Resolution No. 429 "On Licensing of the Use of Dangerous Chemical Industrial Objects."

The Resolution approves new regulations on licensing for the use of dangerous chemical industrial objects.

The licensing authority is the Federal Service for Ecological, Technological and Nuclear Supervision.

The new regulations provide a definition of "dangerous chemical industrial objects" and set out the procedure for obtaining a duplicate license in case of a license loss.

The Resolution will enter into force seven days after its official publication and invalidate previous regulations approved by Government Resolution No. 382, dated 4 July 2002.

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Non-deliverable Derivatives Transactions May Become Enforceable under Russian Law

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

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

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

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Supreme Commercial Court Reconfirms Civil Remedies Against State-owned Enterprises

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

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

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

The Resolution provides that the exceeding by the establishment of the budget set by the owner or failure of the owner to finance the establishment will be no defense to a creditor's claim. This approach is welcome since creditors are unlikely to have notice of the limits of the owner's financing and the

policy decision, leaving the promoter liable for the proper management of the financial affairs of the establishment, and protecting creditors.

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Supreme Commercial Court Imposes Penalties on Late Filers with VAT Exemption

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

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

Background

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

Having considered the case, the arbitration courts of the first and second instance granted the company's claim, basing its decision on the fact that the tax authorities had subsequently confirmed the tax exemption. Thus, the court reasoned, the company had no accumulation of VAT arrears, and could not be penalized. This conclusion was based on the judicial practice of the RF Constitutional Court³ and the RF Supreme Arbitration Court,⁴ stating that "a penalty shall be deemed compensation of damages incurred by the State with regard to the delay in tax payments" and "the taxpayer shall pay a penalty when it accumulates VAT arrears, i.e., tax payments which were not paid on the due date." It should be noted that until recently, Russian courts dealing with tax disputes assumed that a penalty should not be imposed on the taxpayer provided that the taxpayer avoids any VAT arrears.

¹ No. 15326/05.

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

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

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

Supreme Court Reversal

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

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

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

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Customs

On 22 June 2006 the Plenum of the Supreme Commercial Court of the Russian Federation issued Resolution No. 20 "On Certain Questions Arising from the Application of Russian Customs Code Provisions on the Periodic Temporary Declaration of Russian Goods [...]"

The Court clarified issues connected with the application of the rules on periodic temporary declarations which could be submitted to the customs authorities for exported goods, if complete and accurate information required for customs control purposes can not be submitted on the date that the goods are exported from the territory of Russia.

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Public Institutions

On 22 June 2006 the Plenum of the Supreme Commercial Court of the Russian Federation issued Resolution No. 21 "On Certain Questions Connected with the Application of Article 120 of the Civil Code of the Russian Federation by the Commercial Courts when Considering Disputes with Participation of Public and Municipal Institutions."

The Court clarified a number of issues connected with the special legal capacity of public institutions carrying out business activities and administration of budgetary funds by such institutions, as well as submission of claims on the recovery of debts against public institutions.

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Bankruptcy

On 22 June 2006 the Plenum of the Supreme Commercial Court of the Russian Federation issued Resolution No. 22 "On the Procedure for Debt Repayment in the Course of Bankruptcy Proceedings."

The Court clarified that if the claimant in bankruptcy proceedings or the bankruptcy administrator do not provide sufficient financing of bankruptcy proceedings due to a lack of monetary assets and other property of the debtor, the bankruptcy proceedings shall be terminated. In this case the court shall name the person bearing the expenses that may arise before the termination of the proceedings, and issue a writ of execution for the benefit of the person who is entitled reimbursement of such expenses.

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State Budget

On 22 June 2006 the Plenum of the Supreme Commercial Court of the Russian Federation issued Resolution No. 23 "On Certain Questions Connected with the Application of the Budget Code of the Russian Federation by the Commercial Courts."

The Court clarified who shall be considered the proper defendants in proceedings initiated under claims against state bodies and officials or public

institutions. The Court also clarified certain issues connected with the recovery of debts under state (municipal) guarantee agreements and agreements on budget-funded loans, as well as enforcement proceedings initiated against state authorities and public institutions.

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Public Contracts

On 22 June 2006 the Plenum of the Supreme Commercial Court of the Russian Federation issued Resolution No. 24 "On Application of Article 1(2) of the Federal Law 'On Placement of Orders for Supplies of Goods, Execution of Works and Provision of Services for State and Municipal Needs' and Article 71 of the Budget Code of the Russian Federation with Regard to Public (and Municipal) Institutions."

The Court clarified certain issues connected with the legal capacity of public institutions that are entitled to conclude contracts on supply of goods, execution of works and provision of services for public needs. The Court also clarified the procedure of conclusion of such contracts.

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Taxes

On 22 June 2006 the Plenum of the Supreme Commercial Court of the Russian Federation issued Resolution No. 30 "On Certain Questions Connected with the Application of Article 103.1 of the Tax Code of the Russian Federation with Regard to the Extrajudicial Procedure for Recovery of Tax Penalties."

The Court clarified a number of issues connected with the limitation periods for recovery of tax penalties. In particular, the Court emphasized that a person may be held liable for violation of tax laws only within the periods of limitation provided by the Tax Code. The Court also stated that if the amount of unpaid tax penalties exceeds certain amounts provided by the Tax Code, then the extrajudicial procedure is not applicable and such penalties can be recovered only in the course of court proceedings.

The Resolutions will serve as a guideline for lower commercial courts when considering similar issues.

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Ukraine

Improvement in Securities Regulations Benefits Non-residents

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

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

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

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Unified Register of Court Decisions

It has been widely accepted that in recent years the Ukrainian judicial system has failed to develop practices in line with those that would be consi-

¹ e.g., Resolution of the Presidium of the RF Supreme Arbitration Court No. 5, dated February 28, 2001, in which the RF Supreme Court summarized recommendations granted to the lower courts pursuant to its application of the Tax Code Part One.

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

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

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

the Access Law, and an estimated seven million judgments per year should be included on the Register.

The State Judicial Administration is formally charged with administering the Register. However, it is anticipated that, in practice, the Judicial Information Center (a state-owned company) will administer the Register until the Ukrainian courts are fully computerized.² The Access Law requires that the administrator include each decision in the Register within three days of receiving it. All personal information by which an individual might be identified (i.e. party names and addresses) must be coded and kept confidential. Only a limited number of people, such as judges and some categories of state officials, will have access to this information. The Register will be accessible 24 hours a day via the Internet on the official website of the judicial branch of government.³ Preliminarily, paper copies of decisions will also be kept by the courts.

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

² No solid deadline is set; several decrees have been issued by the parliament with respect to "informatization," though implementation depends on the budget and financing to be approved by the government.

³ www.court.gov.ua.

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