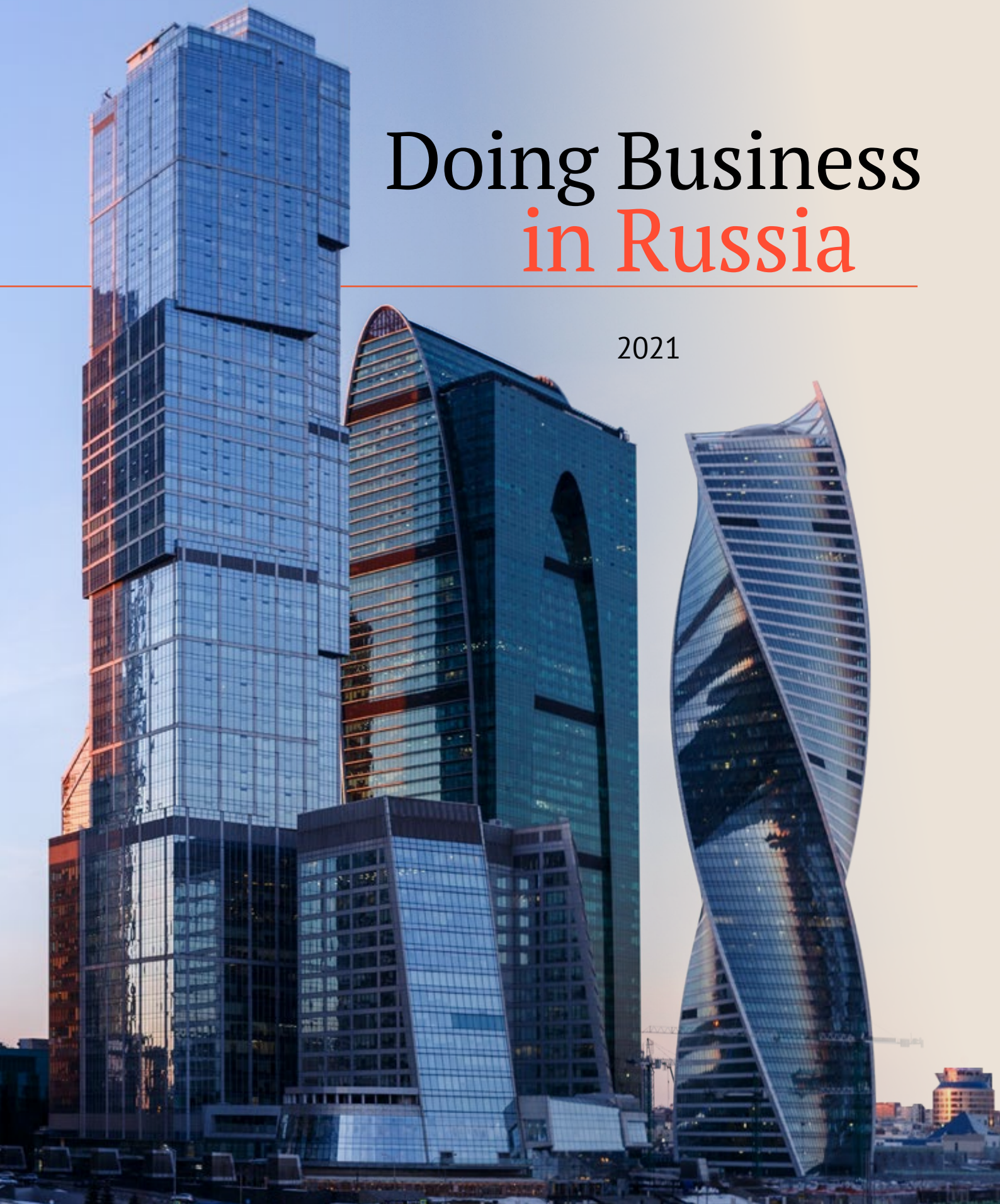
ALRUD

Doing Business in Russia

2021



ALRUD

Table of Contents

Key Information about Russia

Capital	**Moscow**	Population	**146 million**
Area	**17,098,242 km²**	Currency	**Rouble (RUB)**
Legal system	**Civil law system; judicial review of legislative acts**	Inflation rate**	**4.7%**
Investment attraction***	**Out of 20 top countries**		

Governance form	**Semi-presidential republic (recent changes to the Constitution granted more powers to the parliament)**		
GDP per capita***	**$28.797: world rank - 50th**	GDP***	**$4.213 trillion: world rank - 6th**
GDP composition	**Agriculture – 4.7%, Industry – 32.5%, Services – 62.1% Other – 0.7% (these figures include both public and private sector jobs)**		

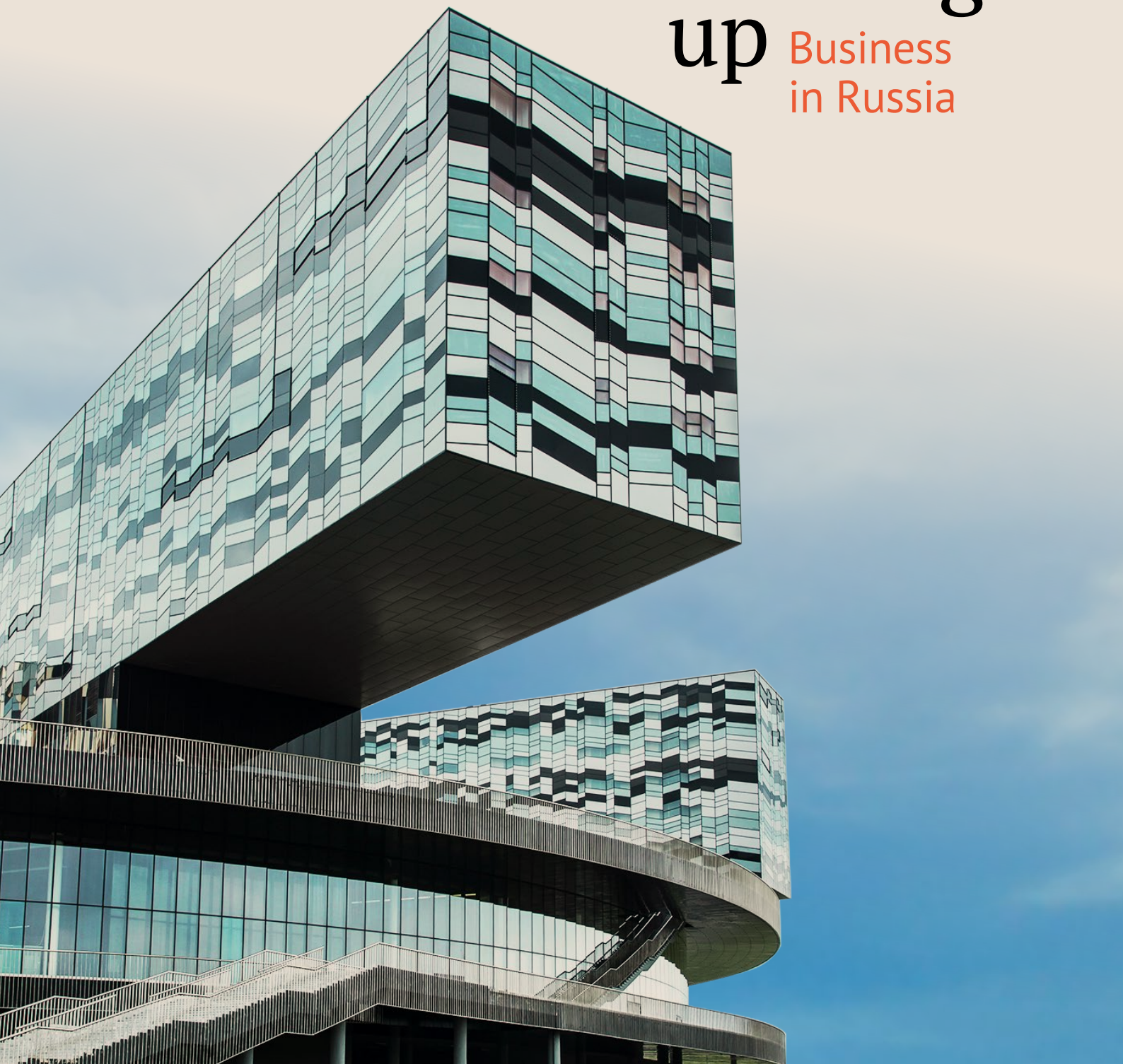
** GDP statistics at purchasing power parity*

*** Inflation rate for 2020 published by Rosstat, a GDP statistics for 2019 published by Rosstat*

**** EY report How to manage investors' trust? Study into investment attraction of European Countries. Russia. June 2019*

ALRUD

Starting up Business in Russia



Starting up Business in Russia

Alexander Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A
E: AZharskiy@alrud.com
T: +7 495 234 96 92

Anton Dzhuplin

Partner, Capital and Equity Markets, Corporate and M&A, Banking and Finance
E: ADzhuplin@alrud.com
T: +7 495 234 96 92

Rules overview

Ways of starting business: Foreign investors may start doing business in Russia by a) selling products to distributors; b) establishing representative offices, or branches, of foreign legal entities; c) acquiring shares in an existing Russian company; d) incorporating a subsidiary; e) incorporating a JV with a business partner.

Recommendations

Foreign investors are advised to take legal advice at the outset and start planning early: Russian legislation provides a number of special rules and incentives, which may be beneficial for foreign investors. These include regional investment projects, special economic zones, special investment contracts etc. These regimes provide various tax and other benefits, subject to meeting certain criteria. Foreign investors are advised to assess the possible benefits under the respective regimes, as their project may qualify for various beneficial regimes, and choose the most appropriate.

Things to remember

In some cases, the starting of doing business, by the foreign investor, requires obtaining permits, or consents, of the Federal Authorities (i.e. such as government commissions, the Federal Antimonopoly Service, Central Bank of the Russian Federation etc.).

ALRUD

Forms

of Business Presence

Forms of Business Presence

Alexander Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A
E: AZharskiy@alrud.com
T: +7 495 234 96 92

Anton Dzhuplin

Partner, Capital and Equity Markets, Corporate and M&A, Banking and Finance
E: ADzhuplin@alrud.com
T: +7 495 234 96 92

Rules overview

General: If a foreign investor intends to create a business in Russia by creating a separate business unit, there is a choice between the establishment of a legal entity (a company) or a separate division, which is not a legal entity (Branches and Representative Offices).

Legal entities: The vast majority of all commercial companies in Russia are incorporated in the form either of Joint stock company ("**JSC**"), which can be public joint stock companies ("**PJSC**") or non-public joint stock companies ("**NJSC**"), the charter capital of which is divided into shares, or limited liability companies ("**LLC**"), the charter capital of which is represented by participatory interests (See '**Limited Liability Companies**' below).

Joint Stock Companies: A JSC issues common shares and may also issue preferred shares. (The most significant difference is that, as a general rule, preferred shares do not provide the right to vote) in order to raise capital for its activities. A JSC is required to maintain a shareholders' register. The register includes information about each registered shareholder, including the number, category, and classes of shares held. Each JSC must delegate the maintenance and keeping of the shareholders' register to a licensed registrar.

One of the key issues of regulation of a JSC is that the issuance of shares, when incorporating a JSC, or increasing the charter capital, is subject to registration by the Central Bank.

Public joint stock companies are subject to stricter regulation in terms of disclosure of information, reporting and corporate governance rules.

Limited Liability Companies: An LLC is the most popular form of a legal entity. It has more flexible corporate governance rules, simpler incorporation rules, easier financing methods and lesser formalities, in certain aspects, than JSCs. The owners' equity participation is determined by their capital contributions. Its capital is divided into "participatory interests" which, since they are not actually "shares", fall outside the scope of Russian securities laws. Therefore, they are not subject to registration with the respective governmental authority as securities.

Participants have the pre-emption rights stipulated by the legislation.

Where a participatory interest is sold to a third party, preliminary consent of other participants, and the relevant LLC itself, may be required by the charter. Agreements for transfer of participatory interests need to be notarized. Failure to comply with the requirements of this form of transaction (e.g. it is not notarized) renders it invalid.

Branches and Representative Offices: A foreign company, that is properly registered in its home country, may do business in Russia through a registered branch, or representative office.

A representative office, or a branch, of a foreign legal entity, is not considered to be a separate Russian company, but rather a body representing the interests of a foreign legal entity in Russia. A foreign company is liable for the activity of its branches and representative offices.

A representative office is entitled to promote business, represent and protect interests of the foreign head office. A representative office cannot conduct any commercial activities.

A branch is a subdivision of a foreign legal entity that may fulfill all, or part, of the functions of its foreign head office, including the functions of a representative office. The scope of authorities of the head of a branch is limited by those set out in the power of attorney granted to him, or her, as the chief executive of the branch, by the branch's head office. This executive role is called the "head of the branch" or "director of the branch".

Branches should be accredited by the Federal Tax Service. Representative offices are mostly accredited by the Federal Tax Service as well. However, representative offices of certain companies – depending on their businesses – are accredited by other authorities (for example, representative offices of foreign banks are accredited by the Central Bank of Russia). The Federal Tax Service issues accreditation of a foreign branch, or representative office, within 30 business days from the date of submission of documents.

Recommendations

An LLC is usually a preferred form of presence in Russia, because it is more flexible in terms of corporate governance and raising of funds.

Things to remember

- As a general rule, the legislation does not establish any general requirement to obtain a license to carry out an activity. It is specifically required for such activities as banking, insurance etc.
- Setting up a branch, or representative office, can be quite a time-consuming process.

Liquidation of a company, or a branch, or a representative office, is also a time-consuming process, which may be associated with noticeable costs, and which may take more than 6 months.

ALRUD

Foreign Investments

& Special Economic Zones

Foreign investments & Special Economic Zones

Andrey Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A, Real Estate, Energy, Natural Resources & Infrastructure
E: Andrey.Zharskiy@alrud.com
T: +7 495 234 96 92

Alexander Rymko

Partner, Banking and Finance
E: ARymko@alrud.com
T: +7 495 234 96 92

Rules overview

Equal treatment

The Federal Law dated July 9th, 1999 No. 160-FZ "On Foreign Investments in the Russian Federation", establishes the main framework, within which it guarantees equal treatment of foreign investors as that enjoyed by domestic ones, unless otherwise specifically set forth in the federal legislation.

Investments safety

Foreign investors are protected from nationalization, or expropriation, unless directly mandated by federal legislation. In such rare cases, when any of the above measures do apply to foreign investors, they are entitled to receive equitable compensation for any investment and other losses.

There are no legislative prohibitions preventing any foreign investor from taking the profits (net of applicable taxes) out of the country, whether in Roubles, or in other currency.

Freedom to make investments

In general, foreign investors are free to make investments in Russia in any industry or form, to acquire stakes and shares, private and government securities, to take part in privatization, to acquire land plots, subsoil resources, buildings, other immovable property, etc.

The most important limitation, of the general rule on free investment, is that a foreign investor may be prohibited from acquiring a certain number of shares, or control over companies that, from the point of view of Russian law, have strategic importance to Russia's national security and defense[1]. For instance, some transactions involving acquisition of shares in, or control over, strategic companies by foreign investors, will be subject to special approval by the Governmental Commission for Control of Foreign Investments. With respect to investments in strategic companies, more stringent restrictions apply to investors which are companies with foreign state participation, or which do not disclose information about their beneficiaries.

Variety of investment regimes

In pursuit of attracting more foreign investors with most favorable conditions, Russia has updated its special investment regimes by developing new types of investment zones and contractual investments mechanisms, based on public-private partnerships. Consequently, foreign investors can enjoy a wide range of options in terms of choosing the best investment regime for their contemplated business activities in Russia.

[1] *"Strategic company" is a legal entity incorporated in the Russian Federation, which engages in at least one activity of strategic importance that is listed in the Federal Law N 57-FZ "On Procedures for Foreign Investment in Companies of Strategic Significance for National Defense and Security", dated April 29th, 2008. 45 areas of business activities regarded as having strategic importance for the national security and defense, such as activities regarding nuclear and radioactive materials, devices and waste; aviation and space; natural resources sector; mass media and telecommunications; activities carried out by entities listed in the register of natural monopolies, etc.*

Below is a shortlist of the special investment regimes, which are favored by foreign investors engaged in greenfield investments, each being governed by a separate Federal Law:

1. **Investment zones.** Obtaining the status of a resident of an investment zone is by way of concluding a special agreement with a managing company of the respective investment zone. In most cases, residents of investment zones receive incentives within the coverage established by the federal law regulating the specific investment zone. Such zones include (i) special economic zones, (ii) advanced development territories (TOR), (iii) free port Vladivostok (FPV), and (iv) other geographically-confined zones, such as the innovative center of Skolkovo, etc.

2. **Contractual Investment regimes: Special Investment Contracts ("SpIC"), Regional Investment Projects ("RegIP")**. These involve entering into a mid-term investment contract with Russian authorities, tailored to the needs of the investor, for the purpose of local production in Russia. SpICs can be concluded on federal, regional or local level, while RegIP's are available for regional level projects only. Their flexibility is that the terms of the agreement are negotiable.

3. **Public-Private Partnership** ("**PPP**", concession). The public partner may be the Russian Federation, a constituent entity of the Russian Federation, or a municipality. Certain rights and obligations of the public partner may be delegated to other governmental authorities and/or legal entities.

Foreign investment structures in Russia are very diverse and often regulated by unrelated legislative acts, and therefore further legal developments are expected to take place, in the future, to provide unification and harmonization of the current regimes.

Accessible benefits for foreign investors

Various investment regimes provide for a number of benefits for foreign investors, including among others:

- Reduced tax rates:
  - Corporate profit tax reduced to 0% vs. 20% regular rate;
  - Property tax reduced to 0% vs. ~2.2% regular rate;
  - Land tax reduced to 0% vs. ~1.5% regular rate;
  - Social Security Contribution reduced to 0% vs. ~30% regular rate;
- Preferential connection to infrastructure / State-sponsored infrastructure construction;
- Tax stabilization periods available for up to 10 years;
- Privileges relating to customs payments;
- Reduced time for conducting administrative inspections;
- Reduced time for obtaining permits for capital construction projects;
- Advantageous land use, including preferential rental rates;
- Managing company can file a lawsuit in defense for its residents;
- Simplified procedure for obtaining the status of a "Russian producer";
- "Sole seller" status in procurement tenders for state-owned companies for Federal SPIC;
- Accelerated amortization of fixed assets.

Possibility of stabilization

One of the most important tax benefits for investors, which is available in the SpIC, TOR and FPV regimes, is a stabilization clause, or so-called "grandfather clause", This guarantees that there will be no amendments increasing the special reduced tax rates for the investors, until the end of the term of investment regime, or its application. This stability however does not apply to excise tax, VAT on domestic goods, and pension fund payments.

In addition, SpIC rules, subject to certain exemptions, provide for the possibility of general stabilization, of the investor's SpIC-governed activities in Russia, against any negative changes in the Federal legislation. Nevertheless, for such stabilization to apply, the possibility of such stabilization for investors has to be directly envisaged in respective rules of the Federal legislation, which so far have been enacted for tax matters described above.

Recommendations

- Not all available investment regimes are listed above and, even within the framework of any one regime, there may be differences depending on the level of the responsible state body and the sphere of activity of the investor. The availability of regimes also depends on the place and industry of the activity. Therefore, we recommend to carefully approach the issue of choosing one (or several) forms of investments regimes, before starting investment activities.
- Plan the application of investment regimes in advance, since the contractual forms of investment regimes require investments after concluding an agreement with government agencies, on the basis of which investment advantages are provided.

Things to remember

- When planning M&A, joint venture or other corporate transactions, regarding shares, or control over the "strategic company", please consider the necessity to receive clearance from the Governmental Commission for Control of Foreign Investments.
- Investment regimes exist at various levels of state power: federal, regional, local. Depending on the regime, each of the levels is supervised by various bodies and organizations that are independent of each other. There is no focal decision center.
- If you become a member of any investment regime, please remember that failure to comply with the requirements, established for the investor and his/her activities, may result in the forfeiture of the benefits that have already been received (and in the case of tax benefits, tax authorities may require additional tax at the standard tax rate).

ALRUD

General

Antitrust Regulation

General Antitrust Regulation

Vassily Rudomino

Senior Partner, Advocate, Competition/Antitrust
E: VRudomino@alrud.com
T: +7 495 234 96 92

German Zakharov

Partner, Competition/Antitrust, White Collar Crime, Compliance and Investigations
E: GZakharov@alrud.com
T: +7 495 234 96 92

Russian antitrust legislation is based on the Federal Law No.135-FZ "**On the Protection of Competition**" dated July 26th, 2006 (hereinafter - the "**Competition Law**").

The government agency for antitrust regulation is the Federal Antimonopoly Service of Russia ("**FAS Russia**"). Generally, FAS Russia has supervisory powers in the following areas:

- merger control (JV establishment, M&A transactions);
- restrictive agreements, concerted actions and coordination of economic activity;
- abuse of dominance;
- unfair competition and advertising;
- tenders, public procurement and state preferences;
- tariffs.

Within the scope of its powers, FAS Russia is authorized to institute proceedings regarding breaches of the antitrust legislation, to hold transgressors administratively liable, to issue warnings and mandatory regulations, to conduct scheduled and unscheduled ("dawn raids") inspections, etc.

It should be noted that the Competition Law has extraterritorial application, i.e. it can be applied to non-Russian persons' and legal entities' agreements, or actions, if they affect competition in Russia. In this regard, when the entity's actions are performed within the Eurasian Economic Union ("EAEU") cross-border markets, i.e. in the territory of at least two of the five member states of the EAEU (Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia), the Treaty on the EAEU (and not the Competition Law) should be applied. Such actions fall under the regulation of the Eurasian Economic Commission, which is the supranational authority of the EAEU.

CONTROL OVER ECONOMIC CONCENTRATION (JV AGREEMENTS, M&A TRANSACTIONS)

Rules overview

Under the Competition Law, a transaction could trigger a merger-control procedure in Russia when it involves:

- A Russian company, or Russia-based main production, or intangible assets;
- A non-Russian company supplying products to Russia, in the amount exceeding 1 billion Roubles, during the year preceding the transaction;
- Joint venture agreements of competitors in Russia.

Merger control clearance is required if the following thresholds are met:

- Worldwide-aggregate value of assets of the companies, participating in a transaction, (including their groups), according to the latest accounts, exceeds 7 billion Roubles OR worldwide-aggregate turnover of the companies, participating in a transaction (including their groups), in the last business year, exceeds 10 billion Roubles; AND
- Worldwide-aggregate value of assets of the target company (including its group), according to the latest accounts, exceeds 400 million Roubles. This is not applicable when entering into a JV agreement and/or establishing a new company).

The asset value of the seller's group is not taken into account, if the seller's group would lose control over the target company upon completion of the transaction.

FAS Russia should grant pre-completion clearance, with regard to the following types of transactions (in case the above-mentioned thresholds are met):

1 **Mergers and acquisitions**

- Direct acquisition of shares/participatory interests of a Russian company;
- Acquisition of Russia-based assets;
- Acquisition of shares of a non-Russian company in case such company: a) supplied products (works, services) to the Russian market in the amount exceeding 1 billion Roubles; b) has a non-Russian subsidiary that supplied products (works, services) to the Russian market in the amount exceeding 1 billion Roubles, during the year preceding the transaction; c) has a subsidiary registered and existing in the territory of Russia.

2 **Conclusion of a JV agreement** between competitors with the purpose of conducting a joint activity in the territory of the Russian Federation with, or without, creation of a separate JV entity.

3 **Establishment of a new entity** (if its charter capital is paid with the shares and/or assets of a Russian entity, or non-Russian entity supplying products to Russia in the amount exceeding 1 billion Roubles, during the year preceding the transaction).

It is also worth mentioning that the Competition Law provides an exemption for intra-group transactions. This exemption applies not only to intra-group transactions with direct shareholdings, but also to indirect shareholdings, when transactions are implemented between companies that are ultimately controlled (more than 50%) by the same parent (i.e. transactions between sister companies).

At the same time, other intra-group transactions (if the companies are included in a single group on any grounds other than majority shareholding) shall still be notified to FAS Russia. However, the acquirer is allowed to apply for post-completion clearance (within 45 calendar days after completion).

Liability for Violations of Merger Control Requirements

Failure to comply with the merger control requirements (e.g. submitting misleading information to FAS Russia, failure to notify FAS Russia within the required time limits, failure to comply with a FAS Russia ruling) and/or closing the transaction without FAS Russia's clearance will lead to:

- For the officers of the entities – imposition of an administrative fine from 15,000 to 20,000 Roubles.
- For the entities – imposition of an administrative fine from 300,000 to 500,000 Roubles.

If the transaction, closed without FAS Russia's approval, has resulted, or may result, in the restriction of competition, FAS Russia may file a lawsuit for invalidation of the transaction in court and, as a result, "reverse" the transaction via claiming it void.

Recommendations

While considering an application, the authority considers the potential influence of the transaction on the state of the competition. Despite the fact that the competitive assessment is not an obligatory document for submission, we recommend to prepare the market overview (with market shares figures) to be submitted with the initial merger filing, even if the overlap in the market is minimal.

The competitive assessment should include the information about the market in general, market shares and main competitors, as well as providing the evidence of the positive influence of the transaction on state of competition. Such approach helps the parties to submit their own understanding of the market to the authority, preventing additional questions, as well as the fact that the authority may define the market too narrowly (or too widely).

Things to remember

The filing fee for a merger control filing is 35,000 Roubles. An application to FAS Russia may be submitted at any time before the transaction is closed. The statutory consideration period for the merger filing is 30 calendar days, from the date of receipt by FAS Russia of the notification and the full set of documents attached thereto. However, FAS Russia may decide to extend this term by 2 months for additional questions/clarifications. In recent years, FAS Russia has tended to perform most thorough analyses of transactions. Thus, the 2-months' extension is the usual practice, especially with regard to foreign-to foreign transactions. Further, FAS Russia is also authorized to extend the review period up to 9 months (in exceptional cases).

It should be taken into account that FAS Russia's decision is valid for one calendar year only. Thus, the parties to the transaction should keep this information in mind, in order to close the transaction within this period.

ANTICOMPETITIVE AGREEMENTS, CONCERTED ACTIONS AND COORDINATION OF ECONOMIC ACTIVITY

Rules overview

The Competition Law prohibits anticompetitive horizontal and vertical agreements, concerted actions and coordination of economic activity.

Horizontal anticompetitive agreements

Cartel agreement is the most serious violation under the Competition Law and, consequently, it is the only violation which may lead not only to administrative liability, but also to criminal liability. Under the Competition Law, the term "cartel" is legally defined as an agreement between competitors that results, or may result, in some, or all of the following consequences:

- Fixing of prices, bonuses, surcharges, discounts;
- Bid rigging;
- Market sharing by volume, territory, sellers/buyers;
- Decreasing, or ceasing, production;
- Refusing to enter into a contract with certain sellers and buyers (boycott).

Cartels are prohibited per se, while other horizontal agreements are analyzed under the rule of reason. Such agreements may be regarded as restrictive, if FAS Russia finds that they lead, or may lead, to the restriction of competition in the market.

Liability for entering into cartel agreements:

Administrative liability may result in a turnover fine of up to 15% of total revenue derived from the sale of products/services, in the market where the violation occurred, during the calendar year preceding the violation, but not less than 100,000 Roubles.

For bid rigging, the Code on Administrative Offences established another administrative liability - a turnover fine of 10–50% of the initial price of the object of an auction, but not more than 4% of revenue derived by an entity from the sale of all goods/services and not less than 100,000 Roubles.

Criminal liability (criminal liability is possible for individuals only) – a fine of up to 500,000 Roubles; obligatory works up to five years, with deprivation of rights to hold certain positions from one up to three years; or imprisonment up to seven years, with deprivation of rights to hold certain positions from one up to three years.

Vertical anticompetitive agreements

Vertical agreements are widely determined, by the Competition Law, to be the agreements between a supplier of products and a purchaser. In other words, vertical agreements are concluded between companies operating at different levels of a supply chain. The most common types of vertical agreements are distribution and dealer agreements.

In particular, the Competition Law prohibits:

- resale price maintenance agreements (except for fixing the maximum resale price);
- exclusive agreements (i.e. agreements that oblige the purchaser not to sell a competitor's products), except for sales under the trademark, or other means of individualization, of either the seller, or manufacturer.

There are also other types of vertical agreements that are assessed, on ad hoc basis, that may be considered as violation of the Competition Law. In particular, exclusivity agreements and territorial restraints are the most widespread vertical agreements that may potentially be considered as a violation.

Please note that, in practice, a producer may sell products not only to a distributor, but also to the end customer. In that case, such a producer will technically compete with its distributor in the market. However, the agreements between such a producer and a distributor shall still be regarded as vertical agreements, thus, legal rules on horizontal restraints are not applied to such agreements (except for the cases when the distributor also produces such products itself).

Entering into a restrictive vertical agreement may lead to turnover fine in the amount up to 5% of total revenue derived from the sale of products/services, in the market where the violation occurred, during the calendar year preceding the violation, but not less than 100,000 Roubles.

Concerted Actions

The Competition Law defines concerted actions as actions by entities a) in the absence of an agreement, b) when their results are in the interests of each participating entity, c) when the actions are known to each of them, due to a public announcement of one of the participating entities, and d) these actions are caused by actions of other participating entities and not in objective circumstances.

Concerted actions of competitors are prohibited, if such practices lead, or may lead, to such occurrences as:

- Fixing of prices, bonuses, surcharges, discounts;
- Bid rigging;
- Market sharing by volume, territory, sellers/buyers;
- Decreasing, or ceasing, production;
- Refusing to enter into a contract with certain sellers and buyers (boycott).

Other concerted practices are analyzed on the ad hoc basis, where such practices lead to the restriction of competition.

Participation in concerted actions may for the legal entity may lead to a turnover fine in the amount up to 3% of total revenue derived from the sale of products/services, in the market where the violation occurred, during the calendar year preceding the violation, but not less than 50,000 Roubles.

Coordination of economic activity

The Competition Law defines the coordination of economic activity as: companies' actions being coordinated by a third party, that does not belong to the same group as any of the companies involved and is active in a different market from that of the coordinating companies. In other words, coordination may be carried out by an association, in which the companies are engaged, or by another third party, which is not active on this market.

Coordination is prohibited if it leads to a cartel, an inadmissible vertical agreement, or other abovementioned circumstances that are prohibited by the Competition Law.

Coordination of the economic activities by a company may lead to the imposition of an administrative fine of up to 5,000,000 Roubles.

Recommendations

If a violation has already taken place, a violator may apply for consideration from one of two leniency programs, which exist in Russian legislation as separate provisions, incorporated in the Code on Administrative Offences and in the Criminal Code.

Under the administrative leniency program, complete immunity from administrative liability is granted to a violator that is the first to report an illegal antitrust practice, present sufficient evidence, and cease this practice. The report should be submitted before FAS Russia issues its decision on the infringement.

Criminal leniency rules are provided for in the Criminal Code of the Russian Federation as a special note to Article 178, which establishes liability for entering into cartel agreements. The criminal leniency program is administered by the Ministry of Internal Affairs and FAS Russia simultaneously. An application for leniency from criminal liability must be made separately from an application for administrative leniency. Under the criminal leniency program, a person can be relieved from criminal liability, if he/she facilitated the investigation of the crime and compensated the damage incurred.

Things to remember

Certain anticompetitive agreements and concerted actions (cartels exclusive) can be considered admissible if such agreements and practices (i) do not give rise to the possibility of competition being eliminated in the relevant market, (ii) do not impose on the parties, or third parties, restrictions not related to the purposes of such agreements and concerted practices, and (iii) result, or may result, in the following:

- improving the production and sale of products, or promoting technical and economic progress, or increasing the competitiveness of Russian products in the world market;
- the purchasers obtaining preferences (benefits) commensurable with the preferences (benefits) obtained by companies, as a result of agreements and concerted actions.

Both restrictive agreements and concerted actions are excluded from the prohibition, and are permitted, if executed within one group of persons, provided that one company controls the other company, or they are controlled by the same company.

ABUSE OF DOMINANT POSITION

Rules overview

Pursuant to the Competition Law, an entity is presumed to have a dominant position in the particular product market, if the market share of that entity exceeds 50%. If the entity's market share is between 35% and 50%, FAS Russia may establish the dominance of such entity, upon analysis of the relevant market.

The Competition Law also provides thresholds for establishing the collective dominance of companies. In general, collective dominance may be defined: if the aggregate share of a maximum of three companies, with the share of each of them being more than shares of others in the product market, exceeds 50%, or the aggregate share of at most five companies, with the share of each of them being more than shares of others, exceeds 70%. This provision shall not apply if the share of at least one of the above-mentioned companies is less than 8%.

It should be noted that the Competition Law does not prohibit having a dominant position. However, a dominant company is subject to certain restrictions since the company's actions may lead to prevention, restriction or elimination of competition and/or infringement of third parties' interests. Such actions include (this list is not exhaustive):

- setting up and maintenance of a monopolistically-high and monopolistically-low price;
- withdrawal of a product from circulation, which later caused an increase of the product's price;
- imposing contractual terms upon a counterparty that are unfavorable, or not connected to the subject of an agreement;
- economically, or technologically-unjustified, reduction, or cutting off the production of goods, if there is a demand and an ability of to provide profitable production;
- economically or technologically-unjustified refusal to enter into the contract with customers, if there is possibility of production (delivery);
- discrimination (setting economically, technologically, or otherwise unjustified-different prices, or other terms of an agreement for different counterparties);
- creation of barriers which block entry into, or exit from, the market for other economic entities;
- violation of the procedure of pricing established by applicable legislation; and
- manipulation of prices on wholesale and/or retail markets of electric power (capacity).

Liability for abuse of dominance may lead to the following administrative sanctions: for officers of the entity – imposition of an administrative fine up to 50,000 Roubles, or disqualification for the period up to 3 years; for entities – turnover fine of up to 15% of total revenue derived from the sale of products/services, in the market where the violation occurred, during the calendar year preceding the violation, but not less than 100,000 Roubles.

Recommendations

FAS Russia closely examines the business conduct of firms holding significant market shares, with strong market power. Thus, the dominant position imposes many additional compliance obligations on the company. FAS Russia permanently renders decisions, on notable cases on abuse of dominant position with large turnover fines and broad coverage in mass media.

Therefore, a dominant company, in its activity shall carefully analyze whether its actions may lead to prevention, restriction, or elimination of competition and/or infringement of third parties' interests, even if such an action is a common business practice in the market.

Things to remember

In practice, standard criteria of market dominance may be inapplicable to certain markets, which have specific conditions of operation in them. Thus, for the purposes of most precise identification of dominant companies, special criteria of dominance have been identified for the entities active in such specific markets, such as financial organizations, power engineering organizations and heating supply companies.

It shall be noted that, to ensure the most precise compliance with the requirements of the Competition Law, FAS Russia issues recommendations applicable to particular markets in which FAS Russia is interested: e.g. pharmaceutical industry, automobile industry, power engineering industry and etc.

UNFAIR COMPETITION

Rules overview

Actions of an entity may be considered as unfair competition, prohibited under the Competition Law, if they meet the following criteria:

- they have caused, or may cause, harm to competitors, or damage their reputation;
- actions are aimed at gaining business advantages;
- contradict Russian legislation, customary business practices, or the principles of honesty, reasonableness and fairness.

The Competition Law prohibits unfair competition in the market, which includes (this list is not exhaustive):

- Defamation, i.e. spreading false or inaccurate information, including about quality, or customer performance, of products of competitors, quantity of products, demand and prices, as well as business qualities of competitors (reliability, good faith, etc.);
- Providing misleading information to customers, including about quality, or customer performance of products, methods and conditions of production of products, place of production, price, etc.;
- Incorrect comparison of products, or entity, with products of competitor, or with the competitor itself. It means, for example, use of words and expressions "the best", "the first", "number one" and other words and expressions that create impression of superiority, without indication of particular factors that are compared, and that do not have objective confirmation;
- Selling products that illegally use a competitor's intellectual property, or acquisition and usage of exclusive rights to means of individualization of legal entities, or products, works, services, impeding implementation of business activity of competitors;
- Mixing with the competitor or with his products or services, including using means of identification identical to the trademark, trade name, commercial designation, brand, name of the location of products of the competitor, or similar to them to the extent of mixture of designation, copying or imitation of appearance of products of the competitor, their corporate style in general, or copying other elements individualizing the competitor and his products;
- Illegal receipt, use, disclosure of information that constitutes a commercial or trade secret, or may be considered an otherwise legally-protected secret.

Recommendations

Establishing the unfair competition is quite complex issue and the list of acts of unfair competition is not exhaustive. We recommend the companies to consider the public information (as well as that published on their websites) with scrutiny, taking into account the abovementioned criteria.

Separately, in case the company considers that its rights were harmed by the act of unfair competition, it should take into account that the it should prove to FAS Russia not only the fact of infringement (and the rights to a trade dress), but also the competitive relations between the violator and a claimant (e.g. market analysis/ customers' survey).

Things to remember

It should be also noted that FAS Russia considers not only the acts of unfair competition, but also the unfair advertising (which is provided by the Article 5 of the Federal Law dated March 13th, 2006 No. 38-FZ "On Advertising"). Such violations are similar in nature, so the Supreme Arbitration Court of the Russian Federation issued the Resolution of the Plenum dated October 8th, 2012 No. 58, where the difference between unfair competition and unfair advertising is established: if the act of unfair competition is made in advertising, provided that such act is distributed only as advertising,

but not in other ways (e.g. on labels of the products, in correspondence with counterparties), such actions are considered as a violation of the Law on Advertising (i.e. otherwise, if any other characteristics of unfair competition were established, it would be possible to consider the incorrect comparison as an act of unfair competition).

Violation of the Law on Advertising leads to the prohibition on the distribution of relevant advertising, as well as administrative liability, under article 14.3 of the Russian Code of Administrative Offenses, in the form of a fine up to 500,000 Roubles. Violation of the unfair competition rules under Competition Law leads to imposition of an administrative fine up to 500,000 Roubles.

TENDERS, PUBLIC PROCUREMENT, STATE PREFERENCES

Rules overview

The Competition Law contains a number of provisions regulating tenders, public procurement, and state preferences. It contains a list of actions, that lead, or may lead, to restriction of competition by bidding, and regulates specific aspects of entering into a contract regarding State property.

Such actions include coordination of the participants' activities, restricting participation in tenders, breaching procedures for determining the winner and creating non-competitive advantages for participation in tenders, when conducting public procurement tenders, or seeking price quotations. Moreover, it is prohibited to conclude anticompetitive agreements between the tender organizer (i.e. public entity) and tender participants (bidders).

It should be noted that the Competition Law is not the only act regulating this sphere. The regulation of tenders and public procurement is also provided in Federal Law No 44-FZ "On the Contractual System for the Purchase of Products, Works and Services for State and Municipal Needs" dated April 5th, 2013. In addition, tenders organized by state corporations and state-controlled companies are regulated by Federal Law No 223-FZ "On Procurement of Products, Works and Services by Certain Types of Legal Entities" dated July 18th, 2011.

Separately, the Competition Law also sets forth the purposes and procedures of granting State preferences and the consequences of failure to comply with these procedures.

In particular, State preferences may be granted, subject to FAS Russia's preliminary approval, for the purposes directly specified in the Competition Law, such as education and science development, sport and physical culture, agriculture protection, environment protection, labor protection, support to small or medium businesses etc.

In order to provide State preferences (as well as municipal), the authority intending to grant the aid must submit an application to FAS Russia for approval. Supporting documents required for FAS Russia application include a draft of the grant, indicating the goals and amounts of the aid and other information, required by the Competition Law.

NATURAL MONOPOLIES

Rules overview

When investing in Russian businesses, the foreign investor should take into account that some areas of business in Russia fall under special legislative regulation, such as natural monopolies.

The regulation of natural monopolies in Russia is based on Federal Law No. 147-FZ "On Natural Monopolies" dated August 17th, 1995, and subordinate legislation. The Law defines and regulates the following natural monopolies:

- Transportation of oil and oil products, via cross-country pipelines;
- Transportation of gas by pipelines;
- Rail transportation;
- Services in transport terminals, ports and airports;
- Public telecommunications and postal services;
- Electric power transmission services;
- Operational dispatch management services, in the electric power industry;
- Services of heat energy transmission services;
- Services involving use of the internal waterway infrastructure;
- Radioactive waste disposal;
- Water supply and removal, using the centralized system and utilities infrastructure;
- Icebreaker assistance and ice pilotage of ships on the Northern Sea Route.

The main regulatory mechanisms in respect of natural monopoly entities are as follows:

Price Control

The prices (tariffs) for products are set by the Russian Government and other authorized agencies. FAS Russia exercises state control over prices (tariffs) for natural monopolies' products (services) and maintains a Register of Natural Monopolies.

The List of "Mandatory Consumers"

The Russian Government has the right to determine the consumers who shall be provided with the products (services) of natural monopolies such as electricity, heat and gas supply. For example, military units, federal agencies, prisons, freighting services and other bodies may be included in such lists.

Disclosure of Information

Natural monopolies have to report their business activity to government authorities and disclose information about their activity, in open sources. The disclosure standards for natural monopolies are tough: most information about their business activity should be publicly available.

According to the Law on Natural Monopolies, the following information must be disclosed and published on the natural monopolies' official sites, or provided to customers, upon request:

- information on prices (tariffs) for products (services);
- information on key consumer characteristics of the supplied products (works, services);
- information on the availability (absence) of technical capabilities to grant access to natural monopolies' services;
- information on conditions, technological, technical and other measures necessary for technological access to the natural monopolies' infrastructure;
- information and progress reports on investment programs/projects, etc.

Russian legislation provides for administrative liability for breach of the Law on Natural Monopolies. According to the Russian Code of Administrative Offences, general liability is applied to natural monopolies for abuse of a dominant position on the market, concluding anti-competitive agreements, concerted practices and unfair competition. Moreover, a natural monopoly which has infringed the pricing procedure (overpricing, or undercutting in respect of the prices (tariffs) set by the State authorities) could be fined up to double amount of unduly-received income. Administrative liability is also envisaged for failure to file notifications to FAS Russia about transactions involving natural monopolies, and for presenting inaccurate, or false information to FAS Russia.

Separately, it should be taken into account that there are specific merger thresholds applicable to acquisition of natural monopolies, such as acquisition of more than 10% of fixed production assets of a company operating in the sphere of natural monopolies.

ALRUD

General

Employment Regulation

General Employment Regulation

Irina Anyukhina

Partner,
Labour and Employment
E: IAnyukhina@alrud.com
T: +7 495 234 96 92

All companies, doing business in Russia, must adhere to the existing Russia labour laws. The labour relationship between employees and employers of all types, in Russia, is governed by the Constitution, the Labour Code, federal laws and other statutory acts containing norms of labour law.

Russian employment legislation is based on the Labour Code of the Russian Federation, dated December 30th, 2001.

The Russian Labour Code is the main codified act that regulates labour relations between employers and employees. In addition, there are federal laws regulating various important aspects of labour relations. The Labour Code constitutes the basis of employment relations in Russia and aims to keep a balance between interests of employers and employees, in light of the constitutional concept of the welfare state.

EMPLOYMENT CONTRACT

Rules overview

Employment contracts must be in writing and contain certain minimum information and terms as prescribed by Russian labour law. Employment contracts must be executed in Russian or bilingual, with the Russian language prevailing.

Employment contracts shall contain obligatory provisions that are stipulated by the Russian Labour Code. The employment contract may also contain some additional terms, which shall not worsen employees' statutory rights (for instance, the term of the probationary period, dismissal termination notice, number of vacation days may not be reduced, etc.).

Generally, employment contracts are concluded for an indefinite term. Fixed-term employment contracts are permitted only in certain specific circumstances and only for a maximum term of 5 years, non-renewable.

In case of the establishment of a probationary period for new hires, the respective provisions shall be included in the employment contract. The term of probation must not exceed three months. A probationary period of up to six months may be established only for heads and deputy heads of organizations, chief accountants and deputy chief accountants, heads of branches and representative offices, or heads of other subdivisions of organizations. During the probationary period, if the employer determines that the employee does not meet the criteria established for the position for which he, or she, was hired, the employee can be dismissed, without a severance payment, by giving three days' written notice, specifying the reasons for dismissal. An employee is also entitled to resign during the probationary period, by giving three days' written notice.

Recommendations

For some categories of employees, the law provides additional conditions and obligations. For instance, an employer may specify additional termination grounds in the employment contracts with general directors of an LLC. It is advisable to pay attention to this option and use it where reasonable.

For the sake of relation transparency and fulfillment control, it is advisable to supplement the employment contract with additional conditions, in part of identifying chains of command and reporting structures.

It is crucial to elaborate and include applicable confidentiality wordings, as well as data privacy and intellectual property covenants.

Things to remember

An employment contract should be executed in writing and there should be two originals, each signed by the employer and the employee. One original copy is given to the employee and the employer keeps the other.

An employer is obliged to conclude a written employment contract with an employee within 3 business days from when the employee starts to work in the organisation. Where the employee actually starts his/her work before the conclusion of a written employment contract, the employment contract with such employee is considered to be agreed, provided that the employee has started work with the employer's knowledge, or pursuant to employer's (or its authorized representatives') instruction.

Failure to specify, in the employment contract, obligatory provisions may entail an employer's administrative liability in the form of a fine.

In the absence of any of the above terms, the missing terms shall be set out in an annex to the contract, or in a separate written agreement. It is also the risk to the employer, to be subject to administrative liability, for the absence of any of the above terms.

If an employment contract does not state that it is for a fixed term, it is considered to be concluded for an indefinite term.

A fixed-term employment contract should stipulate the grounds of its limited duration. Failure to specify such grounds may entail the reclassification of a fixed-term employment contract to an employment contract concluded for an indefinite term.

Certain categories of employees (e.g. pregnant women, women with children under the age of 1.5 years old, etc.) may not be subject to a probationary period.

Depending on the specifics of the particular job role, an employee may be eligible to additional benefits, such as additional vacation days, allowances, compensations, etc. Such conditions should also be reflected in the employment contract.

As a general rule, the terms and conditions of the employment contract may be changed only by written agreement between the employer and the employee, usually by way of an amendment to the employment contract.

However, in the following situations, the employer is not required to obtain employee's consent, provided the proposals do not alter the agreed terms and conditions of the employment contract:

- to transfer the employee to another workplace, or separate subdivision in the same location (e.g. within a city, or town);
- when instructing the employee to work with different equipment.

The employer also does not have to obtain the employee's consent for temporary transfers of the employee, for up to one month, to another job, not referred to in the employment contract, if this is needed for the prevention of emergency situations, or the elimination of their consequences.

In addition, in certain situations, transferring an employee to a job, requiring lower qualifications, is only permissible with the employee's written consent.

In certain situations regulated by law, the employer may change the terms and conditions of employment with the employee's consent, but if he or she refuses, may terminate the employment. For example:

- Where the existing terms and conditions of employment cannot be maintained, due to a change in technological, or operational, working conditions, the employer may change terms and conditions of employment (with the exception of employee's job function) with the employee's written consent and with two months' notice. If the employee refuses to work under the new terms, the employer must offer him, or her, any vacant positions, or work which the employee is able to perform, taking into account his, or her, state of health. If there are no vacant positions, nor work, or if the employee refuses, the employment contract may be terminated on the relevant grounds.
- Where the employee must be permanently transferred to another job, as a result of a medical report. In such a case, the employer must obtain the employee's written consent to transfer him, or her, to another job which is not prohibited for health reasons. In the absence of an appropriate job, or where the employee refuses to transfer, the employment contract may be terminated on the relevant grounds.

WORKING REGIME

Rules overview

Pursuant to Russian law, employers must monitor and keep records of employees' working time.

The employer may establish a cumulative record of working hours. The reference period may be set by the employer, but must not exceed one year. This type of working time record is used when it is not possible to observe the daily, nor weekly, length of working time for certain categories of employees. Regardless, the total number of working hours for the reference period must not exceed the normal number of working hours.

Keeping working time records requires the employer to complete the standard forms, established by law. These forms reflect time actually worked by the employee, including days off, holidays and days of temporary incapacity for work.

The regular working week is 40 hours. A reduced number of weekly working hours is established for certain categories of employees.

Overtime is any time worked in excess of the normal number of working hours set for the employee, unless the employee has an open-ended, working day, pursuant to his, or her, employment contract. Under the general rule, engaging an employee to work overtime requires the employee's written consent (except for certain cases, specifically provided for by law). Overtime work shall not exceed 4 hours, during 2 consecutive days, and 120 hours per year.

Under an employment contract, an employee may be expressly engaged for night work. In this case, each hour of work, during the night, shall be compensated at a higher rate than work during the normal working day. Such a rate of pay must be at least 20% higher than the normal hourly pay for a day's work.

Employees are entitled to paid rest periods, while still being paid the standard salary: a) days off; b) the daily rest of the employee/rest between shifts; and c) breaks during the working day/shift.

All employees are entitled to rest days, amounting to two days off in a five-day working week, and one day off in a six-day working week.

One of the days off should be Sunday. The second day off (i.e. in a five-day working week) must be established by the collective agreement, or the internal labour regulations. Usually, the two days off are provided consecutively.

The weekly, continuous rest-time should not be less than 42 hours.

Recommendations

In some companies, a flexible working regime may be established. In such cases, the beginning, end and total duration of the working day are determined by the agreement between an employer and an employee.

It is possible for an employer to hire an employee under an open-ended, working-day regime. This means that the employer is entitled to engage the employee, from time to time, to work beyond his, or her, normal working hours. Employees, working under an open-ended, working-day regime, must be provided with additional paid annual leave, which should not be less than three calendar days per year.

The list of positions with an open-ended, working-day regime must be stipulated in the collective bargaining agreement, or the internal policy adopted by the employer, taking into consideration the opinion of the representative body of the employees.

Employees with a shorter working-day, or part-time workers, where the length of the working day is reduced, must not be engaged to work under an open-ended, working-day regime.

Things to remember

There is a general rule that part-time employment is permitted, where there is mutual agreement between the employer and the employee.

The employer must establish a part-time working regime for the following categories of employees on request, e.g. for pregnant women; one of the parents, or carers, of a child under 14 years old, or a disabled child under 18 years old; an employee caring for a sick family member, pursuant to a medical report.

A flexible working regime may be established only where there is mutual agreement between the employer and the employee. There are no statutory provisions under which an employer must grant a flexible working regime for an employee. The employer must ensure that the employee works the total number of working hours, within the relevant reference periods (i.e. the working day, week or month).

Payment for part-time work, as well as for flexible work, is made pro-rata.

Overtime work shall be compensated in the following manner:

- for the first 2 hours of overtime per day, the compensation shall be paid at 1,5 times the usual hourly rate, on top of the monthly salary;
- for the subsequent hours of overtime per day, the compensation shall be paid at double amount of the usual hourly rate, on top of the monthly salary.

At an employee's request, increased payment may be replaced by an additional time of rest, that shall be not less than an overtime period.

It is necessary to stipulate a certain working regime for an employee, in the employment contract.

SALARY AND COMPENSATIONS

Rules overview

There is a unified, national minimum wage in Russia, covering all employees. The rate is fixed by federal law, generally once a year, and payment below the set level is prohibited. Since January 2021, the national minimum wage has been 12,792 Roubles per month. In order to take account of regional differences, a regional minimum wage can be set at a higher rate in a Regional Agreement, but there is no obligation on the regions to do this. For example, the regional minimum wage in Moscow is 20,589 Roubles per month; in the greater Moscow region it is 15,000 Roubles per month; and in Saint Petersburg it is 19,000 Roubles per month.

The minimum monthly salary may be paid through the basic salary alone, or may include both basic salary and other payments. According to recent case law, payments, which are mandatory under law, must be paid in addition to the minimum monthly salary (e.g. supplements for work in the Far North regions, or equivalent areas).

In case an employee works in the Far North regions, or regions, which are equal to the Far North regions, or in regions with specific climatic conditions (where a regional coefficient and/or percentage allowance are established), the respective regional coefficient and/or percentage allowance shall be accrued on top of the minimum salary, established for the respective region.

Recommendations

According to law, all salaries must be index-linked. The aim of this is to ensure that salary levels keep up with the growth of consumer prices and that employees' purchasing power is secured. The official consumer price index is a reliable indicator of how consumer prices fluctuate. Given that private companies are also obliged to index salaries, but can establish their own regime, it is advisable to set out an internal policy, governing the regime of salary indexation.

Russian law sets out general rules regarding bonus payments to employees. Employers may make decisions on whether to pay bonuses and on the type and size of a bonus. In order to keep the process under control and make things easier from a tax perspective, it is advisable to set out a separate policy specifying the bonus system in the company.

The Russian tax authorities require that employment contracts include:

- a reference to the internal bonus system of the employer; and
- any special conditions for individual bonuses, payable to the employee.

Local tax authorities only allow employers to off-set bonuses against corporate tax if these requirements are met.

Under Russian law, the employer must not deprive its employees of bonuses for disciplinary reasons. This is because Russian law stipulates an exhaustive list of the types of disciplinary penalties that may be imposed on employees, by the employer, and therefore, imposing any disciplinary penalty, not on the list, is prohibited. At the same time, if there is a local policy saying that employee with a poor disciplinary record is not eligible to bonus, there may be legal ways not to provide such employee with a bonus.

Things to remember

Employees carrying out the work of equal value must receive the same amount of salary.

Russian law provides for specific requirements in relation to the amount of salary received by the (foreign) Highly-Qualified Specialists "(foreign) HQS". Such foreign national employees shall receive not less than 167, 000 Roubles per month.

HOLIDAYS AND DAYS OFF

Rules overview

Under Russian law, an employer must provide an employee with annual paid leave. The minimum entitlement to annual paid leave in Russia is 28 days. Full-time employees and part-time employees have equal rights to annual paid leave.

During the annual paid leave, an employee is entitled to a leave allowance equal to his, or her, average salary, as calculated in a particular way. The total average salary of the employee for the previous 12 months should be divided by 12 (i.e. the number of months in a year). The resulting amount is then divided by 29.3 (i.e. the average number of days per month). This sum is the average daily salary of the employee. This amount is multiplied by the number of leave days taken by the employee, because the leave period may be divided into parts. The resulting total is the amount of leave allowance due to the employee.

The leave allowance should be paid to the employee at least three days prior to the beginning of the leave period.

According to the Labour Code, employees are entitled to paid statutory holidays. The list of such holidays is specified in the Labour Code and must be observed by all employers. If a holiday falls on a day off, the following business day becomes a day off, with certain exceptions. The Government of Russia may transfer the holidays to other dates, for their more rational use.

Work on days off and public holidays is generally prohibited (except for certain cases, specifically provided for by law) and is permissible only with the employee's written consent and on the employer's written instructions, both of which are required.

According to the Labour Code, employers are obligated to provide an employee with annual paid leave.

Recommendations

All employers are obliged to establish annual vacation schedule, which is binding on both the employer and the employee.

For the purpose of better protection of confidential information, it is possible to develop a policy on the use of corporate mail and other resources during the vacation period. A similar regime can also be developed with respect to the use of corporate property (e.g., corporate cell-phone, or car) during the vacation period.

Things to remember

It is prohibited not to provide employees with annual paid leave within 2 consecutive years. Failure to provide employees with annual paid leave within 2 consecutive years may entail an employer's administrative liability, in the form of a fine.

The employer shall approve the "vacation schedule" at least 2 weeks before the beginning of the relevant calendar year.

The leave allowance should be paid to the employee 3 days prior to start of vacation. Otherwise, the employer may be subject to administrative liability.

TERMINATION OF EMPLOYMENT / DISMISSAL

Rules overview

Employment contracts may be terminated only on the grounds stipulated by the Russian Labour Code (e.g., mutual agreement between the parties, expiration of a fixed-term contract, employee's initiative, employer's initiative, etc.).

Generally, the company does not have to notify State agencies about dismissal cases. Exceptions include collective dismissals, due to a company being wound up and redundancies, and dismissal of a foreign employee.

In case of termination of the employment contract due to liquidation of the company (or branch, or representative office), or reduction in workforce, the employer shall pay, to the dismissed employee, a severance allowance equal to the average monthly salary. In addition, the employer shall retain the average monthly salary for a period of job placement, but for no more than 2 months from the date of termination of the employment contract. In exceptional cases, and under certain conditions, an average monthly salary is retained for the employee during the third month following the dismissal date.

The employer shall pay, to the employee, a severance allowance in the amount of 2 weeks' average salary, in some other circumstances specified in the Labour Code.

Recommendations

If an employer terminates an employee without lawful grounds, the employee may apply to the court, claiming unfair dismissal. The employee may also require a change to the records made about the dismissal in the labour book, reinstatement in the job, compensation for the period of forced absence from work and moral damages. The employee may also file a claim with the State Labour Inspection, regarding breach of his, or her, employment rights and this may lead to an administrative penalty levied on the organization and its officials. Hence, it is highly advisable to have proper legal preparation, prior to any dismissal.

An employer is not allowed to dismiss an employee, at the employer's initiative, during the employee's sick leave and/or during the employee's leave (including annual paid leave, maternity leave, childcare leave, etc.).

Things to remember

In case of dismissal of a remote employee, due to the staff redundancy, it is advisable to notify the State agency at the place of the employer's registration, as well as at the place of an employee's place of residence. In case of an employee's dismissal due to staff redundancy, it is necessary not to fill the redundant vacancy within 6 – 9 months.

Retirement, as well as restructuring, are not grounds for termination of the employment contract and cannot be invoked by employers.

It is recommended to clarify an employee's social status before his, or her, dismissal based on any grounds, in order to determine whether an employee belongs to a protected category.

REMOTE WORK

Rules overview

The new law significantly changed the regulation of remote work from January 1, 2021, and the respective amendments to the Russian Labour Code have been adopted.

The amendments established new types of temporary remote working regime:

1. Permanent remote work (during the term of an employment contract);
2. Temporary remote work (no more than for 6 months); or
3. Period remote work, when the period of remote work is followed by office work (mix of remote and office work).

In exceptional cases (such as workplace accident, fire, epidemic, etc.) an employer may temporarily transfer an employee to a remote working regime, without his or her consent.

Procedure and form of communication between remote employees and employer shall be specified by internal local policies or employment contracts.

Employers shall use an enhanced qualified electronic signature and employees shall use enhanced or non-enhanced electronic signature in case of conclusion, amendment or termination of the following documents:

- Employment contracts and additional agreements to them;
- Contract of material liability;
- Training contract;
- Documents terminating the above contracts.

The legislative changes provides for new additional grounds for dismissal of remote employees and their list may not be extended. They include:

- Non-communication, without a justifiable reason, for two consecutive workdays following the employer's request;
- Relocation to another geographical area with no chance to continue fulfilment of job duties (this option is possible only for permanent remote employees).

Employers shall provide all equipment for work. If employees use their personal equipment for business purposes (e.g., personal laptop, mobile phone, etc.), employers shall provide employees with compensation for such usage.

Recommendations

New provisions of Russian law stipulate the new obligation, according to which certain issues with remote employees shall be governed by a special policy on remote work.

Due to legislative changes, the employment contract with remote employees shall contain new obligatory provisions.

To comply with the new legislative requirements, it is advisable to:

1. Review current employment contracts with remote employees;
2. Review and update/draft remote employment contract templates;
3. Revise/adopt the policies in order to establish and regulate various procedures of remote employment;
4. Develop health & safety instructions for use of company equipment provided to remote employees;
5. Establish procedures of document execution and interaction with remote employees, as well as the types of used e-signatures;
6. Establish cybersecurity, confidentiality, data privacy rules for remote employees.

Things to remember

Russian law requires that the policy on remote work (or employment contract) shall govern the following matters:

- Various types of remote employment;
- Health and safety provisions;
- Procedure of document execution and interaction with remote employees;
- Conditions and procedure for offline interaction with employees;
- Reporting procedure;
- Cybersecurity, confidentiality, data privacy rules for remote employees;
- Regulation of the working hours and regime of remote employees;
- Provisions regulating how the employees will be provided with the required work equipment, compensation and expense reimbursement.

Under Russian law, companies shall adopt the respective Policy on remote work even no employees are working remotely.

HR DIGITALIZATION

Rules overview

Starting from 1st January 2020, all companies are obliged to keep employees' work experience (labour books) in electronic format.

In this regard, the company is obliged to obtain employees' written consent and then regularly notify the Russian Pension Fund, via providing a certain form (form SZV-TD) in relation to HR changes related to employees (e.g., hiring, transfer to another position, dismissal, etc.).

The form should contain the information about the employee, information regarding HR changes, as well as (for the very first submission of the information) all the information on the labour activity, in the company, from the very first day of the employment of the individual. (This information shall correspond to the information specified in the labour book).

The form shall be filed with the Russian Pension Fund within tight deadlines (in most cases, the next day after the HR-related change occurs).

Recommendations

Due to the necessity to keep employees' work experience in electronic format, the company should amend the Internal Labour Regulations in the section covering "hiring and dismissal". At the same time, each company's local policy, which contains provisions on labour books, should be amended respectively.

Things to remember

The company shall issue an internal order on the implementation of measures on transfer to electronic labour books. It is necessary to appoint a person who will be responsible for keeping and filing employees' electronic labour books.

On the last day of an employee's employment, the company shall also provide an employee with a labour book in electronic format.

IN-HOUSE COMPLIANCE

Rules overview

Employees are subject to "labour discipline", which means mandatory subordination to the rules of conduct determined by law, applicable collective agreements, the employer's internal work rules and the employment contract. The employer is obliged to create the conditions necessary for the observance of labour discipline by employees.

Statute specifies the disciplinary penalties that an employer may impose on employees for a disciplinary offence, defined as the non-performance, or improper performance, by an employee of the work duties assigned to him, or her, due to the employee's fault. The penalties consist principally of warnings, reprimands and dismissal, on disciplinary grounds permitted by law. An employer must not impose a disciplinary penalty – such as a fine, or suspension from work - for which there is no provision in law.

Russian legislation requires employers to implement a number of internal policies related to diverse employment issues. Setting out these obligatory policies builds the in-house compliance system.

The obligatory local policies are: Internal Labour Regulations; Remuneration Policy; Health and Safety Policy; Regulations on Personal Data (supplemented by consents) and some others.

Recommendations

All policies, set out in the company, shall be binding upon employees and the employer. They shall apply to all employees of the company, subject to the provisions of employment agreements between Employees and the Employer, job descriptions, and local normative acts of the employer.

It is recommended to adopt the following local policies in a company: Bonus Policy, Anti-Corruption Policy, Commercial Secrecy Policy, Policy on Protection of Corporate Information Assets, etc.

There are no statutory standards, nor processes, in Russian law in relation to performance management (apart from disciplinary and employment termination procedures). Thus, companies are adopting different procedures, depending on their business models and needs.

To be enforceable against employees, performance management processes shall be formalized as an internal policy of the Russian Company. All employees shall be notified of the policy and confirm, by their signature, that they are obliged to comply with it.

Performance management does not automatically mean that an employee may be dismissed due to a disciplinary sanction, but may precede to possible disciplinary sanction. Employees will not normally be dismissed for performance reasons, without previous warnings.

If an employer has concerns about employees' performance, the employer is entitled to undertake an assessment to decide whether each employee corresponds to his/her job position. The procedure involved will depend on the circumstances, but may involve reviewing your personnel files, including any appraisal records, gathering any relevant documents, monitoring employees' work and, if appropriate, interviewing a particular employee regarding his, or her, work.

Things to remember

Employers are also required to issue an internal order each time when an employee is hired, transferred to a new job, granted a vacation, is subject to a disciplinary sanction, dismissed, as well as in some other cases.

Global policies, which may apply to employees of a Russian company, shall be duly localized, in accordance with the requirements of Russian law, to have legal force.

Each policy should be in Russian, or bilingual, with Russian language prevailing. It should be approved by an authorized officer of the company and introduced to the employees against their signatures.

FOREIGN NATIONAL EMPLOYEES

Rules overview

A foreign national employee has the same rights and obligations as an employee with Russian citizenship and is granted the same level of protection under Russian law. Each foreign national employee must obtain a work permit (for employees from visa-required countries), or a migration patent (for employees from visa-free countries), prior to commencement of work in Russia, as well as a work visa (if a visa is required to enter Russia).

There are two main procedures for obtaining the work visa and work permit for foreign employees from visa-required countries: standard procedure and simplified procedure for highly-qualified specialists (foreign) HQS.

The standard procedure is very bureaucratic and multistage and takes from 3 up to 4 months. Work permits and work visas, issued under this procedure, are valid for up to 1 year. Foreign nationals applying for a work permit, under the standard procedure, shall confirm their knowledge of Russian language, history of Russia and basics of Russian laws, by passing a respective test. In addition, such foreign nationals are also required to pass an extended medical examination.

The procedure for (foreign) HQS is less complicated and faster and takes about 1 – 2 months. The main qualification requirement to use this procedure is an amount of salary: it should not be less than 167,000 Roubles per month, under the employment contract. The work permit issued for (foreign) HQS is valid for up to 3 years. The work visa for (foreign) HQS is issued for the term of validity of the work permit, i.e. maximum for 3 years, and such a work visa is multiple entry, from the date of issuance.

Recommendations

It is important to provide all the required notifications to the migration authorities on time. Failure to comply with this obligation may result in the company's administrative liability in the form of an expensive fine.

Foreign nationals can work only in those regions in Russia which are specified in his, or her, work permit. To apply for a work permit specifying several regions of Russia, the employer shall have registration in each of these regions.

Things to remember

Russian law requires notifying the immigration authorities about hiring a foreign employee, as well as about termination of employment of a foreign employee. The notification shall be filed with the migration authorities, no later than 3 business days from the day of the respective hiring, or termination.

Russian law also requires notifying the migration authorities on the salary payment of (foreign) highly-qualified specialists. The notification shall be filed with the migration authorities quarterly.

Russian law provides for certain restrictions on the number of foreign employees working in particular economic areas (the amount of the respective restriction depends on the particular economic area). Certain restrictions may be applied for representative offices and branches depending on the territory where they are established and the area of activities.

ALRUD

Tax

Tax

Maxim Alekseyev

Senior Partner
E: MAlekseyev@alrud.com
T: +7 495 234 96 92

Rules overview

Tax system	• 3-tier system of taxation: federal, regional and local taxes • Regulated by the Russian Tax Code.
General tax rates	Corporate tax – 20%: 3% paid to the federal budget and 17% - to the regional budget. VAT – 20% (0% - export sales of goods and certain services; 10% - basic foodstuffs, certain children's and medical goods). Property tax - tax rates may differ in regions, but cannot exceed 2.2% of average annual value nor 2% of cadastre value. Transport tax - particular rates, for different types of vehicles, are adopted by the regional authorities. Land tax – tax rates may differ within municipal units, but cannot exceed 1.5% of the cadastre value of the land plot. Personal income tax (withheld by the employer as the tax agent) – 13% within the threshold (threshold - 5 mln Roubles per year) / 15% over the threshold for residents and foreign nationals - highly qualified specialists (with respect to the income received under their employment agreement), 30% for non-resident. Social security contributions on the salary of the employee – paid by the employer: • Pension Fund - 22% within the threshold (threshold in 2021 – 1,465,000 Roubles), 10% over the threshold • Social Security Fund – 2.9% within the threshold (threshold in 2021 – 966,000 Roubles), 0% over the threshold • Federal Mandatory Health Insurance Fund – 5.1% Rates may be reduced for some groups of employees. Accident insurance contributions – vary from 0.2% up to 8.5%, depending on the class of a professional risk that employer's activity entails.
Withholding tax	• Dividends – 15%. • Interest – 20%. • Royalty – 20%. Rates may be reduced by Double Tax Treaties.
Incentives	• Exemption from taxation of dividends and sale of shares under certain conditions. • Corporate tax 0% for medical and educational companies, Skolkovo residents. • Reduced rates of corporate tax (3%) and social security contributions (7.6%) for IT and Technology companies. • Beneficial tax regime for small business. • Regional governments have the right to reduce the regional part of the corporate tax rate. • A number of the special investment regimes providing the reduced tax rates and other advantages for investors (special economic zones, advanced development territories, special investment contracts, special administrative districts).
Limitations	• Transfer pricing rules. • Thin capitalization rules. • CFC (Controlled Foreign Companies) rules.

Recommendations

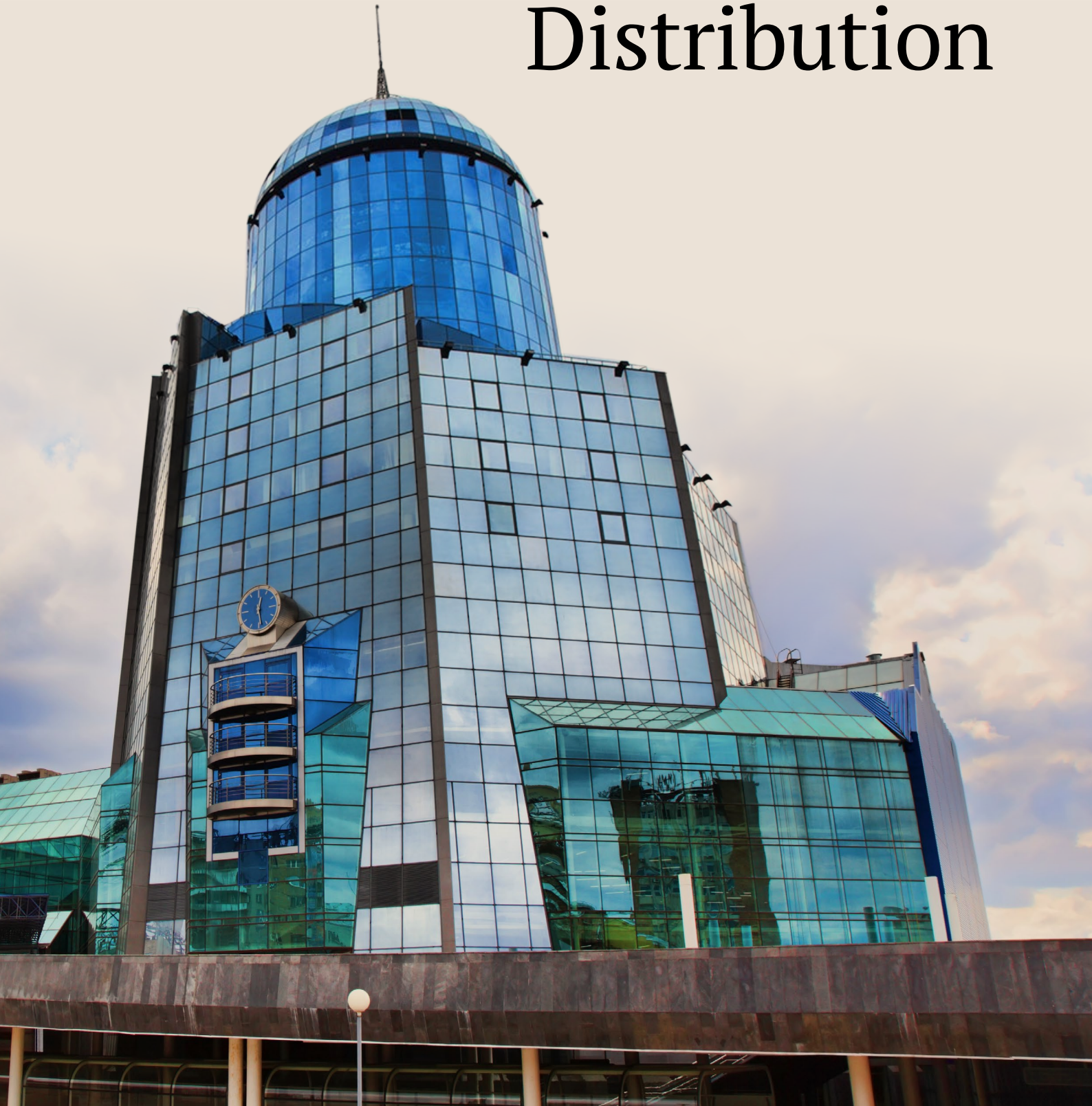
- Plan your investment strategy beforehand, in order to meet the specific requirements for application of the beneficial investment regimes and tax incentives, provided by the Russian tax legislation.
- Analyze the scope of the activities of employees that are sent to Russia, in order not to trigger a permanent establishment risk. Only activities of a preparatory and auxiliary nature, (i.e. gathering and provision of the information to the head office, advertising and market research, accounting and some others) for the benefit of the head office, do not trigger any obligation to pay corporate tax for the foreign company.
- Include the provisions on tax warranties and indemnities into agreements. The Russian tax legislation and court practice are subject to frequent changes and varying interpretations. Also, it is impossible to get a government tax ruling, in order to assess the tax consequences of the transaction.
- Adapt the group policy on the allocation of the group costs. Intragroup services are often challenged by the tax authorities and require special execution for tax purposes.
- Conduct tax due diligence in order to exclude the potential tax risks and reveal tax reserves of the target (e.g. overpayment of taxes, tax losses that can be carried forward).

Things to remember

- Generally, companies file most of their tax reporting on quarterly basis (corporate tax, VAT, personal income tax and social contributions reporting), though making most of their payments on monthly basis. In contrast, while individuals usually file their personal income tax returns and pay tax on annual basis (on incomes from which personal income tax was not withheld by the tax agent).
- A field tax audit cannot go back for more than 3 years before the year when it was initiated: e.g. if the field audit is initiated in 2021, the tax authority can check the accuracy of the calculations of taxes paid for 2018-2020.
- Non-Russian companies providing electronic services (e.g. rights to use software, streaming music, films, gaming services, hosting, website and webpage support, etc.) to Russian customers are obliged to register with the Russian tax authorities, file VAT declarations on a quarterly basis and pay VAT (where applicable) at the rate of 16.67% on the gross value of the provided services.
- Transactions between the Russian company and its foreign affiliate are subject to transfer pricing requirements, if the total income received through such transactions exceeds 60 mln Roubles in a year.
- To apply the reduced tax rate, or exemption, under the Double Tax Treaties ("DTTs"), the recipient must provide the Russian payee, acting as the tax agent, with the confirmation of tax residence and the beneficial-owner status beforehand. Otherwise, the Russian tax authorities may reject the application of DTT's provisions and recover the amount of unwithheld tax from the Russian company paying income.

ALRUD

Distribution



Distribution

Maria Ostashenko

Partner, Data Protection and Cybersecurity, Commercial Law, Intellectual Property
E: MOstashenko@alrud.com
T: +7 495 234 96 92

Rules overview

Definition: Russian civil law does not recognize a concept of distribution agreements, although such types of agreements are extensively used in Russia. The Russian Civil Code states that parties are entitled to enter into an agreement, whether or not such agreement is contemplated by law, as well as containing elements of different agreements contemplated by law (a mixed contract). Under the distribution agreement, the supplier usually grants the distributor the right to purchase, promote and resell the supplier's products, within the territory defined in the agreement. A distribution agreement can be either exclusive or non-exclusive. Exclusivity can be applied to goods, geographic territory or consumers. However, it may contradict the competition law, if an exclusivity clause leads to violation of competition law. Therefore, the provisions of distribution agreements, restricting the distributor from selling products, should be drafted and analyzed, on a case-by-case basis, from the perspective of their compliance with Russian competition law.

Compliance with Russian law mandatory rules: Russian law allows a distribution agreement to be governed by a non-Russian law, if the agreement satisfies the requirement of a so-called "foreign element", which can be either a non-Russian party, or another non-Russian element. In the event that the parties decide to govern their distribution agreement by a non-Russian law, it is also necessary to verify the compliance of such agreement with mandatory rules of Russian law, as well as Russian contractual practice. The scope of mandatory rules typically refers to public policy issues. However, in practice, this includes some, or all, of the following aspects of distribution agreements: antitrust regulations, currency control regulations, technical regulations, intellectual property, taxes, etc.

Antitrust restrictions: As briefly mentioned above, entering into, and performance of, distribution agreements, are permitted by Russian competition law, unless such agreements contradict it. The parties to distribution agreements, being vertical agreements, in terms of competition law, (agreements between economic entities at different levels of the supply chain), must comply with antitrust restrictions. Russian competition law allows economic entities to enter into vertical agreements, if the market share of each party does not exceed 20%, or such agreement is a franchising agreement. Otherwise, vertical agreements may not contain such anti-competition clauses as price fixing, or refusal to sell competitive goods.

Currency control regulations: Currency control regulations apply to distribution agreements between Russian and non-Russian entities. A Russian currency-control resident is obliged to receive the goods for which such party paid. Therefore, it is prohibited to include, in a distribution agreement, any provisions contradicting this rule, e.g. provisions on set-off. Further, according to Russian currency control rules, each agreement, between a Russian resident and a non-resident, must be recorded in an authorized Russian bank, if the total price exceeds 3 million Roubles for import agreements and 6 million Roubles – for export agreements.

Remedies and liability: The Russian Civil Code provides for various remedies, in the context of distribution agreements, including:

- compensation of damages and penalties,
- indemnities,
- warranties and representations,
- payment of interest,
- right to unilateral termination,
- specific performance, etc.

The damages, in terms of Russian law, include the damages suffered (which are costs actually incurred in connection with a contractual breach) and the loss of profit. Russian law does not recognize indirect, or consequential, damages. As to compensation of damages in the case of distribution agreement termination, pursuant to Russian Civil Code, if a contractual breach of the distributor leads to its early termination, the supplier may enter into a similar agreement. The supplier may then require compensation of losses: equal to the difference between the price of terminated agreement and the price of comparable products specified in the newly-concluded agreement, with another distributor.

Material and non-material breach: If there is a breach of agreement, the breaching party is liable for that breach and the non-breaching party is entitled to claim contractual remedies. Russian civil law distinguishes material and non-material types of breaches. This leads to different consequences. A material breach is defined as a breach of agreement by one party, that causes such harm to the other party: that it is substantially deprived of what it was entitled to expect, when the agreement was entered into. According to the Civil Code, in case of material breach in a supply of goods agreement, the party may unilaterally withdraw from the agreement, in cases provided for by law (e.g. repeated breach of the terms of delivery of goods, repeated breach of the terms of payment for the goods).

Liability and Force Majeure: By operation of Russian law, unless the parties (being entrepreneurs) agree otherwise, a party is liable for a breach of agreement. This is irrespective of whether it is the fault of the breaching party. Parties can only be exempt from liability if they prove that it was impossible to perform obligations, due to Force Majeure events. For an event to constitute Force Majeure, it must necessarily be extraordinary and unavoidable.

Events not considered as Force Majeure: Russian law states that such Force Majeure events do not include, in particular, breach of obligations on the part of the debtor's counterparties, lack of goods on the market necessary for the performance, the debtor's lack of the necessary funds. It should be noted that Russian court practice does not consider economic crisis, fluctuations in exchange rates, nor devaluation of national currency, as Force Majeure events. The courts have regarded these circumstances as a risk that is essential for any business activity.

COVID-19: Given the outbreak of coronavirus in 2020 and its impact on contractual obligations, there are discussions as to whether COVID-19 outbreak constitutes a Force Majeure event, from a Russian law perspective. It remains a questionable point for the agreements, entered into before the outbreak, and depends on various factors including the provisions of a particular agreement. At the same time, for the agreements to be entered into after the outbreak, it is advisable to agree not only on a Force Majeure clause covering such events as coronavirus outbreak, but also on alternative remedies mitigating the risks of impossibility to perform the obligations, due to outbreaks.

Recommendations

When entering into a distribution agreement, it is necessary to observe the following recommendations:

- The parties, to civil relations, must act in good faith, in exercising their civil rights and obligations. Under Russian law, the legally-recognized principle of good faith implies that contracting in good faith is assumed.
- The Civil Code provides for the mitigation of losses principle. This means that a party, which has incurred losses from a breach of agreement, needs to have taken reasonable measures to minimize the amount of losses suffered, in the case of breach of agreement, by the other party.
- If the parties have opted for a penalty, the court may reduce its amount specified in the agreement, if it is clearly disproportionate to the consequences of the breach. In applying this rule, the courts have a discretion to change the penalty sum agreed by the parties. The aggrieved party is not obliged to prove the occurrence of losses, but has a right to provide evidence as to what consequences such breach of obligation has for a non-breaching party, acting reasonably under comparable circumstances.
- Classifying certain events, as Force Majeure in an agreement, does not always mean that it will be regarded as Force Majeure by the court in case of a dispute. The court will need to ascertain whether an event is extraordinary and unavoidable in every case, regardless of the terms of the agreement.
- Under the distribution agreement, the parties can agree on various terms and conditions to regulate their relations in necessary detail, but need to take into account that the terms, which are not compliant with mandatory rules of the law, or contradict the purpose of statutory regulations, will be unenforceable.

Things to remember

Since a distribution agreement is a complex type of agreement, relating to import of goods into the EAEU territory, it is important to bear in mind the following when negotiating and performing this agreement:

Digital labelling formalities: Due to the significance of a distributors' role in the supply chain, new requirements of mandatory digital labelling affect them directly. Distributors frequently act as importers of products into Russia. They must undergo customs procedures and ensure that products are properly labelled, before the goods may be sold. Otherwise, there is a risk that imported products may be seized by customs authorities, due to failure to comply with mandatory legal requirements.

Compliance with EAEU requirements: Since Russia is a member-state of the Eurasian Economic Union (EAEU), there is a set of mandatory laws and regulations with which all must comply. When entering into a distribution agreement with a foreign supplier, you should keep in mind that there are multiple types of products which are subject to confirmation of conformity with the EAEU technical regulations. Only legal entities, registered in an EAEU member-state, may submit an application to obtain confirming documents. Foreign suppliers often authorize their distributors to perform the functions of a foreign manufacturer in Russia and act as an applicant for confirmation of compliance purposes. Further, it is also necessary to keep in mind EAEU competition rules prohibiting setting out territorial, and other, restrictions in distribution agreements, entered into by entities, located in the EAEU member states.

ALRUD

Sanctions

Sanctions

Andrey Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A, Real Estate, Energy, Natural Resources & Infrastructure
E: Andrey.Zharskiy@alrud.com
T: +7 495 234 96 92

Rules overview

Due to the escalation of the Crimea crisis in 2014, several countries, including the US and the EU, have implemented a series of sanctions programs against Russia. These are basically aimed at restricting specific transactions with Russian companies, or any deals with certain Russian persons, or companies controlled by them.

In response to the sanctions policy continued by the West, Russia has replied with a number of countermeasures: these have resulted in institutionalization of its own sanctions regime. The Russian sanctions framework comes down to the following two Federal laws:

1. Federal Law dated December 30th, 2006 No. 281-FZ "On special economic measures and mandatory measures";
2. Federal Law dated June 4th, 2018 No. 127-FZ "On measures of action (counteraction) towards the unfriendly actions of the US and other foreign states".

These legislative acts, listed above, do not create, nor regulate, the sanctions themselves, but vest the competent authorities, namely the Russian President and the Government, with the right to implement sanctions, within the scope covered by the respective law. Below is the list of main sanctions currently implemented by the Russian President and Government, based on the above laws:

1. Product embargo against certain Western countries: ban on import, into the Russian territory, of a number of grocery products from the US, the EU, Canada, Australia, Norway, Ukraine, Albania, Montenegro, Iceland and Lichtenstein, as set forth in the resolution of the Russian government dated August 7th, 2014 No. 778;
2. Individual sanctions against Ukrainian entities and individuals: blocking (freezing) of non-cash funds, non-documentary securities and property, located in Russia and a ban on transfer of money, or assets, outside the Russian territory. Sanctions have been, and are being, introduced against certain Ukraine-related individuals and entities, listed in the resolution of the Russian government dated November 1st, 2018 No. 1300, as well as against certain entities controlled by the listed persons;
3. Sectoral sanctions against Ukraine: consist of two blocks:

   a) ban on import, into the Russian territory, of a variety of agricultural and grocery products, household and industrial products, which are of Ukrainian origin, or dispatched from the Ukraine, or transported via the Ukrainian territory;

   b) ban, or restriction, on export of certain oil and chemical products. The lists of products banned, or restricted to import and export, are provided by the resolution of the Russian Government dated December 29th, 2018 No. 1716-83.

Things to remember

Sanctions against Russia (its citizens/legal entities) introduced by the US, the EU, and other countries, are not part of Russian legislation. Russian courts and state authorities may decide not to acknowledge any such sanctions, as compelling Russian entities to perform any specific actions (whether, or not, envisaged by a private contract).

Current judicial practice identifies the difference between situations in which the contractual party itself complies with the sanctions' regime, and when the parties are deprived of the opportunity to fulfill the obligation, due to such compliance by third parties:

1. With reference to the legal position of the Russian Constitutional Court, the Russian entity's own compliance with the foreign sanctions regime may be considered by the Russian courts as bad faith conduct, violating the public policy of the Russian Federation, which can be a sole ground for refusal of legal protection.
2. In the meantime, imposition of sanctions may be considered as a 'Force Majeure', or a material adverse change for an entity, which cannot fulfill an obligation, as the result of compliance with the anti-Russian sanctions by third parties (foreign). For this conclusion, there should be a direct causal link between the imposition of the sanctions and the impossibility to fulfil certain contractual obligations, while an indirect impact of the sanctions' regime can be insufficient.

At the same time, we believe that the possibility of reference to Force Majeure, or a material adverse change, to a larger extent depends on the factual circumstances of a particular case, including the nature of the contractual obligation, whether it is possible to replace a supplier, or purchase similar goods from it, the jurisdiction of the parties, and so on.

Thus, compliance with Russia-targeting sanctions, if required, has to be conducted with caution. The approach to such compliance should be elaborated on case-by-case basis, depending on the scope of the ultimate goals of such compliance.

Recommendations

Taking into account Russian sanctions-related legislation and practice we recommend to note and implement the following, while doing business in Russia:

1. To ensure compliance with Russian countersanctions, while contracting with counterparties, inter alia, you should comply with import and export restrictions, check absence of the counterparties in sanctions lists, maintained by Russia;
2. If possible, to avoid direct reference to compliance with foreign sanctions as the reason for Russian entity to exercise some legal actions (e.g. termination of a contract with a counterparty or its amendment/suspension). To think of other formal grounds instead;
3. To consider current judicial practice while drafting sanctions clauses to contracts, to draft such clauses on a case-by-case basis, using legal instruments typical for Russian legislation, instead of making direct reference to foreign sanctions' requirements per se;
4. To assess possible sanctions-related risks and options depending on the background of a specific business and particular situations.

ALRUD

Real Estate

Real Estate

Andrey Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A, Real Estate, Energy, Natural Resources & Infrastructure
E: Andrey.Zharskiy@alrud.com
T: +7 495 234 96 92

Rules overview

Real Estate register

Rights to real estate in Russia are recorded in the State register (the "Register"), which is a public source of data on Real Estate in Russia. The Register contains not only legal information, but also technical data (such as area, land/property plan). Technical data is prepared by specially-accredited experts – cadastral engineers.

The law requires that the ownership of real estate shall be recorded in the Register. There are limited exceptions, when rights to real estate exist without this registration: for instance, in case of reorganization of the legal entity, inheritance of property by individual, and some others.

Information contained in the Register can be obtained by anyone, for an insignificant fee. Some limited information is available online, free of charge. However, consolidated information on someone's property is not publicly accessible, though could be retrieved, mainly by officials, by owners themselves, or by a representative under a notarial Power of Attorney.

Notarization of real estate-related contracts is not obligatory, save for few exceptions (for instance, sale of participatory share, in a right of common ownership). However, the parties still may opt for voluntarily notarization of their contract, to mitigate the risks and to simplify the formalities. Notaries are obliged to submit the documents executed, or notarized thereby, for registration. Their filings are processed in electronic manner and more quickly.

Not only title to real estate, but also some contracts, are required to be registered. The law states that such contracts come into effect only once they have been registered (for instance, a lease exceeding 1 year, or contract involving a shared participation in investment into residential real estate). However, the courts generally recognize validity of such contracts for the parties, despite lack of their State registration, provided that the parties agreed on key required terms, though such contracts are not binding for third parties, including a purchaser of a leased property.

The Register contains information on encumbrances, which may be registered in relation to real estate (e.g. mortgage, arrest, prohibition of registration) and/or information on any special status of real estate (object of cultural heritage, military property etc.) and/or remarks on technical condition of property (e.g. unauthorized reconstruction of buildings, overlapping of boundaries of a land plot etc.) which may affect operation of the property, disposal thereof etc.

Rights to real estate

Russian law envisages two principal titles to real estate: ownership and lease.

Foreign citizens and legal entities may own real estate, with no significant limitations. As an exception, foreigners are not able to acquire agricultural land plots, land plots in border areas and other specially-designated territories, in accordance with federal laws.

Russian law does not provide for any trustee, nor nominee, holding of ownership. A person/entity recorded in the Register cannot refer to any agreement prescribing nominee ownership.

Transactions involving real estate, located on the territory of the Russian Federation (contract of sale, lease contract, etc.) shall be governed by Russian law. Real estate disputes should be considered by the Russian State courts (with some exceptions). Documents submitted for State registration shall contain Russian text (be in Russian, or bilingual).

Compulsory purchase of private property by the State, for public needs, is possible only on a limited list of grounds (implementation of international agreements of the Russian Federation, building and reconstruction of objects of federal, regional or local significance, etc.). Purchase price in such cases is based on the market value of the property.

Recommendations

- Due diligence of property assets is strongly recommended, prior to acquisition. Despite specific cases, the Register does not provide a guarantee of title and/or compensation of losses, due to loss of registered title.
- Due diligence shall normally cover not only the current title, but also previous ones, as well as a review of technical, town-planning, land and other documentation. In some cases, it is recommended to engage technical experts to verify parameters of the property.

Things to remember

- The statutory terms of registration of title are short, but in case of defects in the transaction, the registrar is entitled to suspend the registration for up to 3 months. This shall be taken into account when structuring the deal, especially if the due diligence reveals any potential issues. Should reasons of suspension be not timely eliminated, a registrar may reject registration.
- Transactions with the State, or municipal real estate (including lands) are strictly regulated and, in most cases, require public auction. The breach of applicable procedure entails risks of invalidation of title.
- Transactions involving land plots (especially located in remote territories) require specific attention, since the public registers might contain outdated, or unverified, information, with respect to the boundaries of such plots. Land verification (cadastral) works may be required.
- Some Russian legal instruments that originate from foreign contractual practices (such as warranties, indemnities, escrow) nevertheless may have material differences from the original concepts. This should always be taken into account.

ALRUD

Construction

Construction

Andrey Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A, Real Estate, Energy, Natural Resources & Infrastructure
E: Andrey.Zharskiy@alrud.com
T: +7 495 234 96 92

Rules overview

Developers

Under Russian law, the developer is defined as person, or entity, having title to the land plot and procuring construction, or other related activities, on this plot.

The developer shall apply and receive all permits related to construction. Such permits are granted to, and in the name of, the developer.

Foreigners can act as developers, without any limits (save for statutory limitations to own specific lands in Russia).

Ownership and lease are the most common rights over the land which allow construction. For State-owned lands, it is, in most cases, required to complete public tender procedures to obtain a lease, or ownership, which are strictly regulated and any breach of which may lead to invalidation of title and issued permits.

Contractors

Construction activities are subject to a specific form of non-State licensing in Russia, requiring the contractor to join one of non-commercial, self-regulating organizations (SRO). There are 3 types of SROs, depending on the area of business: engineering surveys, project design and construction works. Requirements of the members are established by each SRO, based on the statutory framework.

Each SRO is the guarantor of contractual obligations of its members. The applicant shall inter alia choose the limit of its contractual fees, which would affect the membership fees.

Foreign contractors are allowed to join SROs, provided that they have local registration (branch, or representative office) and comply with SRO requirements.

Construction process & key milestones

Commencement of actual onsite construction works is only possible upon receipt of a State construction permit. There are only rare statutory exceptions, when such works may be performed without obtaining the permit.

Prior to design work, and commencement of construction, the developer shall obtain town-planning data (extract) with respect to a land plot, which is valid for 3 years. If construction is not commenced within this period, it is required to re-apply and if the town-planning or zoning data has changed, the project will need to be amended to reflect these changes.

Upon completion of construction, the developer shall receive a State commissioning permit (permission-to-use entitlement). Use of the building, prior to receipt of this permit, could entail imposition of a material penalty.

The completed construction is subject to State registration. It is also possible to register the incomplete construction, if needed (for instance, for purposes of sale, or mortgage).

Construction contracts

Construction contracts are normally detailed and require professional drafting and negotiating.

Construction contracts in Russia are normally governed by Russian law. However, such contracts could be governed by a non-Russian law, provided that there is foreign element involved (for instance, a party to the contract is a foreign entity). If a non-Russian law is chosen, the Russian imperative norms and standards would still apply (national construction standards, tax and accounting issues, other).

Use of international construction forms (FIDIC, other) is quite limited in Russia. In each case, it requires deep adaptation and tailoring, since some provisions and concepts of the international forms differ from Russian key regulations.

Recommendations

- In-depth due diligence, of the land plot for construction, should be conducted, with specific attention to analysis of the town-planning regime, procedure of forming the boundaries and existing limitations.
- Choice of contractor shall inter alia include its detailed verification for legal and tax good-standing, to mitigate tax risks.
- Construction contracts should be carefully structured and drafted, subject to best practices and legal instruments, available under the law applicable to the contract.

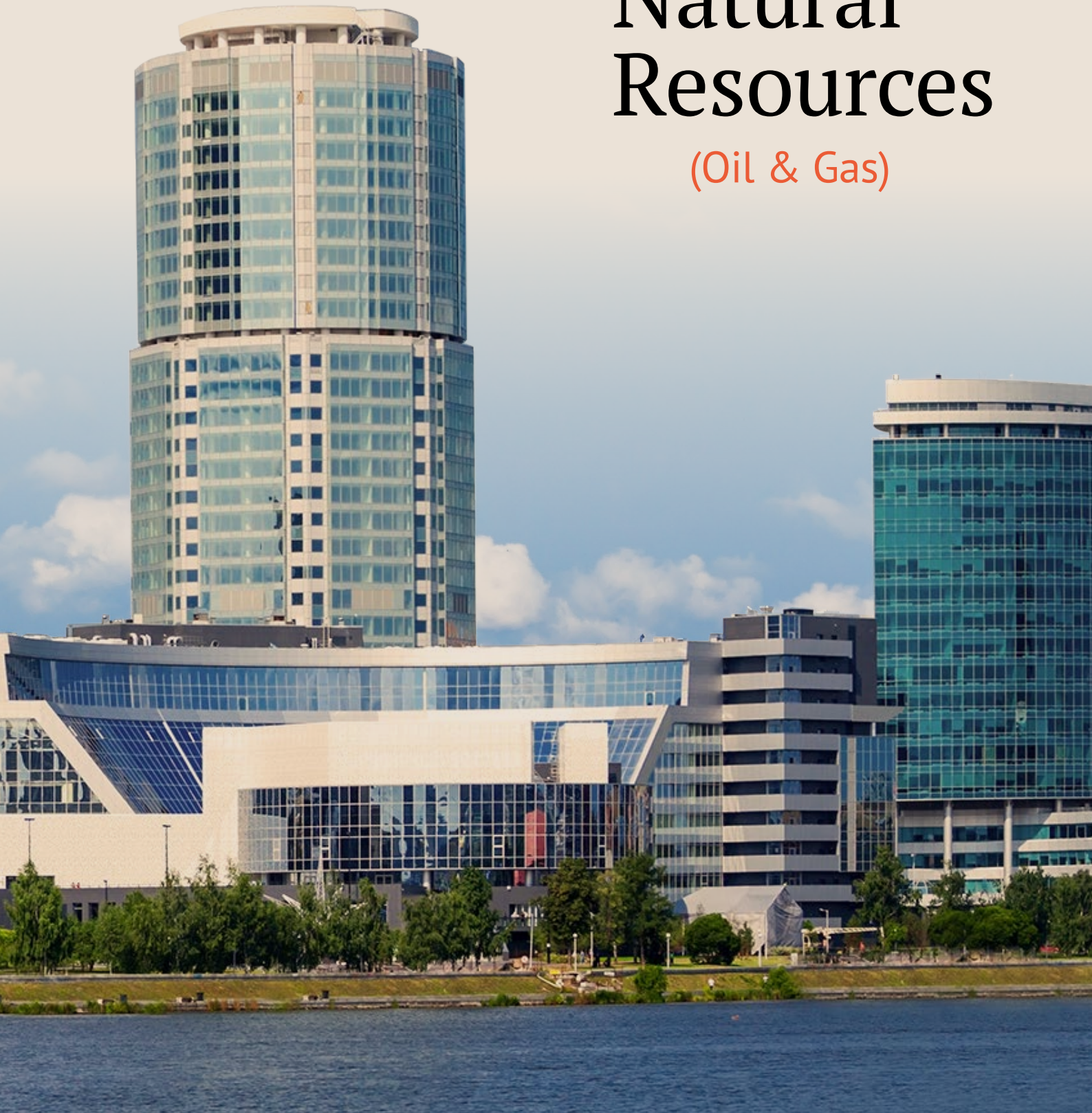
Things to remember

- For developers, diligent choice of the land plot is the matter of key importance. Most land plots for construction are granted by the State / municipal authorities. As a general rule, the land-allotment procedure requires public tender. Breach of this process may lead to invalidation of title and issued permits.
- The buildings and constructions, built in breach of town planning regulations, or land requirements, can be deemed to be unauthorized construction, with the risk of their forced demolition, at the instruction of an official.
- For contractors, the choice of SRO shall not only be made solely based on formal statutory requirements (such as location of SRO), but also reputation, amount of SRO's capital, etc. It is recommended to diligently assess all factors. It is not recommended to enter the market by joining the SRO, chosen solely due to minimum requirements and fees.

ALRUD

Natural Resources

(Oil & Gas)



Natural Resources (Oil & Gas)

Andrey Zharskiy

Partner, Advocate, PhD in Law
Corporate and M&A, Real Estate, Energy, Natural Resources & Infrastructure
E: Andrey.Zharskiy@alrud.com
T: +7 495 234 96 92

Rules overview

The Subsoil Law (No. 2395-1 dated February 21st 1992, as amended) is the key legal act in Russian oil and gas production. It provides the general legal framework for the use of subsoil resources in Russia, the permitted regime for the use of subsoil (geological survey and exploration, production and related construction), subsoil-use licenses and permits, requirements for the applicant, rational use of subsoil, general liability issues for breaches of the Subsoil Law, and so on.

In accordance with the Subsoil Law, all Russian subsoil resources in the soil, including oil, gas, and other minerals, are owned by Russia, irrespective of who holds the title to the relevant land plot, or the relevant **subsoil license**. Subsoil cannot be the subject of transactions. However, rights of extraction of subsoil resources can be granted under subsoil licenses that, as a general rule, grant ownership rights of the extracted resources to the license holder.

A subsoil license is a set of documents that specify the details of the user of the subsoil, the purpose of the work, boundaries of the subsoil area, payment conditions, soil-protection conditions, etc. Subsoil licenses in Russia include a) geological survey licenses, b) exploration and production/mining licenses, and c) combined licenses for geological survey, exploration and production/mining activities. Subsoil licenses are issued by the Federal Agency for Subsoil Use (Rosnedra), which is responsible for granting subsoil licenses, except for licenses for strategic deposits.

A geological survey license may be granted for a maximum period of 5 years, or ten years for offshore fields. Exploration and production/mining licenses and combined licenses are issued for a term equal to the duration of the project. In practice, they are usually granted for 20 or 25 year terms. Generally, the term can be extended, if there have been no violations of the license terms and conditions by the license holder.

In order to operate an oilfield, in addition to the subsoil license, a company shall obtain a number of licenses and permits including, in particular, a mining allotment, land use permits, licenses for conducting supporting activities (i.e. using explosive materials, mine surveying, etc.), and a favorable environmental assessment.

Subsoil rights cannot be freely sold, pledged, or otherwise transferred to another entity, nor encumbered, except in certain limited circumstances specified by the Subsoil Law. Those instances comprise inter alia a) transfer of subsoil rights from a parent company to its subsidiary and vice versa, and transfer between the subsidiaries of the same parent company; b) transfer following a merger of the license holder with, and into, another company; c) transfer following a consolidation of the license holder with another company; d) transfer following a spin-off, or split-off, of a new company.

The license may be revoked, in case of violations of substantial terms of the license agreement. However, such revocation should be, in any case, preceded by a formal notification, by the licensing State authority, about the risk of revocation, if the committed violation is not remedied within at least 3 (three) months, following the receipt of such formal notification.

The Russian law determines a special type of subsoil plots to be **subsoil plots of federal significance**. It defines grounds for establishment and termination of rights to use subsoil plots of federal significance. The subsoil plots of federal significance include subsoil plots containing occurrences of uranium, diamonds, nickel, cobalt, tantalum and other, or contain certain substantial reserves of oil, natural gas, gold and copper, or are located in internal sea waters, territorial sea waters, or on the continental shelf of the Russian Federation; or that can only be developed using land designated for defense and security purposes.

Russian foreign investments' legislation provides for restrictions on the acquisition, by foreign investors, of control over companies operating subsoil plots of federal significance. Specifically, foreign investors may acquire direct, or indirect, control of 25% or more voting shares of such a company, subject to preliminary clearance of a special Governmental Commission, headed by the Prime Minister of the Russian Federation.

Receiving the Governmental Committee's clearance is a formal procedure that a foreign investor will need to undergo, should the mentioned thresholds be exceeded. This procedure could last from 3 to 6 months, following the date of filing.

It should be separately noted that, in case of acquisition of more than 5% of shares (even in cases when the above-mentioned preliminary clearance is received), a foreign investor should also submit post-closing notification, in order to inform the authority about the performed transaction.

Recommendations

When structuring a transaction in relation to a company, in the oil and gas sector, it is critical to know the foreign investment limitations, set out by Strategic Investment Law, as well as the possibility for the license area to qualify as the subsoil area of federal significance. The limitations of such a qualification are detailed above.

At present, some energy projects in Russia are under the application of a number of international sectoral sanctions. To check if your acquisition asset falls under one of those sanctions, we recommend conducting a sanctions-compliance review.

When acquiring companies using subsoil licenses, always ensure compliance with the license terms. A major failure of compliance, which cannot be cured in a timely manner, can result in revocation of the license.

Things to remember

In addition to the subsoil license, conducting mining activities requires you to secure a number of additional mandatory documents and permits (technical documents, insurance, environmental permits, etc.)

Transfer of a license can only be made in a form of the sale of the shares, of a company which owns the license.

In accordance with the provisions of the Subsoil Law, the use of subsoil is carried out on a paid basis and includes both a compulsory one-time payment, paid upon receipt of the subsoil license, and regular payments that must be paid throughout the entire term of the subsoil license.

Holder of subsoil license conducting mining activities are obliged to submit special reports on a regular basis and transfer geological information to Rosnedra and/or its territorial bodies.

ALRUD

Intellectual
Property

Intellectual Property

Maria Ostashenko

Partner, Data Protection and Cybersecurity, Commercial Law, Intellectual Property
E: MOstashenko@alrud.com
T: +7 495 234 96 92

Rules overview

Russia is a party to many major international treaties covering intellectual property ("IP") issues, including the Bern Convention, Universal Copyright Convention, Paris Convention for the Protection of Industrial Property, Patent Cooperation Treaty, Trademark Law Treaty, Madrid Agreement Concerning the International Registration of Trademarks and the Protocol to the Madrid Agreement, and the Singapore Treaty on the Law of Trademarks. The main principles of these treaties are governed by Russian legislation.

The main legislative act, regulating intellectual property issues in Russia, is the Fourth Part of the Civil Code of the Russian Federation ("Code"). The Code protects a broad list of IP objects, in particular: copyright, patents, trademarks, know-how, selection achievements (plant varieties and animal breeds).

On April 23th, 2019, the Plenum of the Russian Supreme Court adopted the Resolution that summarizes court practice, in the area of intellectual property, in recent years. This document shall be used as a guideline to other courts, when considering IP disputes. The Resolution harmonized the most significant of previous courts' decisions and clarified certain issues that had been heavily debated in previous years. For instance, it is directly stipulated that disputes on trademarks and domain disputes are subject to consideration of arbitrazh (commercial) courts, regardless of participation of natural persons. Previously, there was no unified approach to this issue, among Russian courts.

Recommendations & things to remember

Obtaining rights

Prior to acquiring any IP rights, a right holder should perform specific formalities, i.e. State registration. Copyright, related rights objects, know-how and trade names do not require such registration and are protected automatically. In contrast, trademarks, inventions, industrial designs, utility models are subject to mandatory State registration with the Russian Patent Office (Rospatent). The lack of registration entails lack of protection in Russia. Due to the territorial nature of such registration, protection of registered IP objects will be subsequently limited to the territory of Russia. Any patents, or certificates, obtained in other countries, are not valid in Russia.

Company names are protected as IP from the moment of the company's registration, in the trade register. If the registration of a company name is prior to the registration date of an identical or confusingly-similar trademark for the same goods or services, a company name will have priority against a trademark. A right holder of such company name is entitled to challenge the registration of trademark.

Disposing rights

Russian law recognizes various forms of IP-related agreements including license, franchising, pledge/loan, and assignment agreements. Russian laws offer some leeway for choice-of-law provisions, in allowing the parties to an IP agreement, to select which jurisdiction's laws should govern this agreement and the parties' obligations under this agreement.

Nevertheless, Russian law requires mandatory registration of agreements related to patents, or trademarks, protected in Russia, even if they are concluded between foreign parties. However, it is sufficient to notify a registrar about the deal without submitting an agreement itself. This is significant, if parties are eager to keep the commercial terms of the agreement confidential.

Under Russian law the right to dispose of certain IP objects, such as company names and trade names (designations which are used for individualization of enterprises, like banners of stores) are not allowed. However, an exemption is provided for the disposal of trade names, under a franchise agreement, or in case of the transfer of the enterprise in a M&A transaction.

Protection of rights

Obtaining IP rights enables the right holders to protect their rights and prohibit any unauthorized use of such rights.

1 | IP CANCELLATION AND INVALIDATION DISPUTES

Decisions on the trademark and patent registration can be challenged in the Chamber of Patent Disputes, a department of the Russian patent office (Rospatent). Decisions of the Chamber of Patent Disputes can be further appealed, in the Court of Intellectual Property Rights.

A specialized Court of Intellectual Property Rights, consisting of judges specializing in IP-related issues, resolves disputes on appeals against the decisions of the Chamber of Patent Disputes, non-use and cancellation actions. It considers all civil claims regarding IP infringement, as the court of cassation appeal.

A trademark can be canceled by an interested person, due to non-use for three consecutive years. In order to cancel a trademark due to non-use, it is required to comply with a pre-trial procedure (i.e. send a cease-and-desist letter to the owner of the unused mark and ask the right holder to voluntarily withdraw rights to the unused trademark, or assign it to the interested person).The right holder of the non-used trademark has two months for to respond to such letter. If no response is received, the claimant has 30 days to file a trademark-cancellation claim to the Court of Intellectual Property Rights. The only requirement, for the claimant to cancel a trademark, is to prove its interest in the cancellation of the trademark, including by starting using similar trademarks.

The trademark will be canceled, unless it is proved that the right holder has used it, within three years preceding the pre-trial procedure.

Due to the above-mentioned, we recommend that our clients register trademarks covering goods and services in respect of which, our client will use the trademark, or expect to use it in the future.

2 | INTELLECTUAL PROPERTY INFRINGEMENT DISPUTES

Russian law provides effective solutions in protection against counterfeiting and unfair competition. Right holders, or exclusive licensees, have a right to enforce their trademark rights in courts. Russian legislation provides for civil, administrative and criminal (the latter is for individuals only) liability, mainly for the infringement of copyright, patent, and trademark rights. The amounts of compensations can rise to 5,000,000 Roubles (appr. 70,000 EUR), or double the price of the counterfeit goods, or double the price of a non-exclusive license for the goods/services.

Some specific forms of protection are provided in respect of certain IP infringements. Today, under the so-called "Antipiracy Laws", the owners of copyright, and related rights objects, have gained a mechanism for protection of the rights on the Internet. These include, inter alia, blocking websites with illegal content. More specifically, starting from 2013, several laws, specifically addressing an issue of online copyright enforcement, were adopted.

Currently, there are many domain-name disputes in Russia. Domain names are not protected as intellectual property. However, the use of the designations in domain names, that are protected as trademarks, or company names, can lead to IP disputes. If the use of the domain name is of an unfair nature, the right holder of the trademark is entitled to claim for the cancellation of such domain name, or transfer of the domain name to the right holder.

In case of violation of IP rights by a competitor, another applicable remedy, for the right holder, is to submit a complaint to the Federal Antimonopoly Service (FAS Russia) demonstrating:

- competition between the right holder and the infringer;
- unlawful use of intellectual property and/or trade dress;
- the losses, or the harm, to goodwill of the right holder, or exclusive licensee.

The liability for unfair competition in Russia is an administrative fine. The fines for unfair competition, related to a sale of goods infringing the intellectual property rights, are from 1% to 15% of the company's revenue. Moreover, afterwards the right holder, suffering from unfair competition, is entitled to compensation for damages in the courts.

Another significant issue is unfair imitation of the package, distinctive elements of products or, especially, overall "look and feel" of the product – trade dress. In 2016, the Russian Law on Competition was significantly amended and partly harmonized with the European laws. Currently, the imitation and any unfair use of trade dress is deemed as an act of unfair competition. Since 2016, the overall number of disputes concerning imitation of competitors' trade dress has significantly increased. In most of them, Russian courts has found grounds for trade dress protection and prohibited competitors the unauthorized copying, or imitating, trade dress.

The protection of trade dress, by means of the competition law, does not depend on the registration of IP rights. The only criteria for trade dress protection are the use of trade dress and its recognition among Russian consumers.

A special measure of IP protection is the prohibition of parallel import. Pursuant to Russian law and the Treaty on the EAEU, goods that include IP objects may be imported, into the territory of the EAEU, only by the right holder, or under its prior consent. The key act with regards to parallel import is the Ruling of the Constitutional Court of Russia that stated the following:

- Parallel import is unlawful and infringes IP rights, provided that a right holder acts in good faith;
- Parallel import infringements and import of counterfeit goods should be treated differently (in particular, in case of a parallel import, compensation should be lower and no destruction of illegally-imported original products should be available, by default).

One of the effective measures, for preventing parallel import, is including the IP object into the Customs Register of IP Objects, maintained by the Russian Customs Service. From 2020, it is expected that it will be possible to include IP objects in the Unified Customs Register of IP Objects of the EAEU.

Advertising regulation

The Russia law on advertising, and some other laws, provide guidelines for fair and truthful advertising.

Unfair and untruthful (misleading) advertisements are prohibited. Advertisements may not contain incorrect comparisons, nor discredit the honor, dignity nor business reputation of third parties, including competitors. All advertising materials, except for registered trademarks, must be in Russian, or include a Russian translation, which must be of the same size, font and color as the original language.

Certain content cannot be used in advertising. For example, scenes of smoking, or consuming alcohol, should not be depicted, and healthcare professionals can only be shown in advertisements for medicines which are targeted solely at professionals.

FAS Russia is responsible for enforcement of the advertising legislation (the Federal Law on Advertising and some other laws) and legal proceedings, in respect of unlawful advertisements. Competitors or consumers, who consider that an advertisement contravenes the law, may file a complaint with FAS Russia, or its regional offices. FAS Russia may also initiate proceedings at its own discretion.

The general liability for unlawful advertising is an administrative fine of up to 500,000 Roubles per infringement, for companies. For certain breaches related to finance advertisements, the fine may rise to 800,000 Roubles.

ALRUD

Data Protection

Data Protection

Maria Ostashenko

Partner, Data Protection and Cybersecurity, Commercial Law, Intellectual Property
E: MOstashenko@alrud.com
T: +7 495 234 96 92

Rules overview

General framework

Russian data privacy regulations are based on the Strasbourg Convention for the Protection of Individuals, with regard to Automatic Processing of Personal Data ("Convention 108"), the Russian Constitution, the Federal Law on Information, Information Technologies and Information Protection, the Russian Labor Code, the Federal Law on Advertising, the Federal Law on Communications, and mainly on the Federal Law on Personal Data ("Personal Data Law"). On October 10th 2018, Russia signed a protocol modernizing Convention 108 and, as a result, will have to incorporate several significant amendments into national legislation. For instance, a procedure for data-breach notification, introducing genetic data as the new type of sensitive data, strengthening its data-minimization principle and privacy by design concept.

Key definitions

Personal Data Law employs the following principal definitions:

- Personal data is defined as any information relating to an identified, or identifiable, directly or indirectly, individual (data subject). In practice, the notion of personal data is construed broadly so that, in addition to information traditionally attributed to personal data, it may also include certain technical (e.g., information processed with use of cookies) and other data.
- Personal data processing means any activity (operation), or set of activities (operations), which are performed using personal data, whether or not by automatic means.
- Data controller means public authority, municipal authority, legal entity or individual, that alone, or jointly with others, organizes and/or processes personal data, and determines the purposes of personal data processing, content of personal data to be processed, activities (operations) performed using personal data.

Recommendations

Legal grounds for personal data processing

There must be a legal ground for processing of personal data (e.g., consent, contractual necessity, legitimate interest, etc.). Russian authorities are quite conservative in this regard so, in practice, consent is the most widespread legal ground. Moreover, in some cases, the law defines an individual's consent as the only appropriate legal ground. For example, any direct marketing communication, with an individual, requires that individual's explicit (opt-in) consent. The laws do not set out any legal exceptions (such as controller's legitimate interest) in this regard.

Consent shall be fully-informed, precise (informative) and freely given. It shall be an opt-in consent – the concept of opt-out consent does not work in Russia. In certain cases, Russian laws require an individual's written consent:

- data transfer to so-called "inadequate" jurisdictions ("Adequate" jurisdictions are: a) States that are party to the Convention 108; b) countries approved by the Russian Data Protection Authority 'Roskomnadzor');
- transfer of employees' personal data to third parties, including an affiliate of the employer, if such transfer is not directly required by Russian labor laws;
- processing sensitive personal data (data regarding race, nationality, health, intimacy, religion, philosophical and political views, etc.) and biometric personal data;
- exclusively automated decision making;
- other cases provided by Russian laws.

Required documentation

Along with practical implementation of certain technical solutions, data protection compliance is based on the accountability principle – in particular, it implies elaboration and adoption of certain legal and organizational documents and procedures.

There is a number of legal and organizational documents necessary to data controller to comply with Russian legal requirements and address the concerns of the data protection authority and Russian data subjects.

For instance, under Russian law, all aspects of processing should be reflected in internal data processing policies. Policies should be duly implemented in the company which means that i) policy is approved by the order of the company's General Director (other duly authorized officer), ii) policy is compliant with Russian law and iii) all employees put their wet signatures in special acknowledgment form confirming that they are aware with the policy's provisions (so-called "familiarization procedure").

Cross-border data transfer

Cross-border transfer of personal data is defined as a transfer of personal data to a foreign third party (foreign individual, legal entity or state authority) abroad. Key requirements on cross-border data transfers include entering into a data processing agreement and ensuring an appropriate legal ground to the transfer, according to the adequacy of recipient country.

Localization of processing of personal data of Russian nationals

Law on personal data requires that as of September 1, 2015 controllers of personal data ensure that certain types of processing of personal data belonging to Russian nationals are carried out with use of the databases located in the territory of Russia at the moment of collection of personal data of Russian nationals (including collection via the Internet). It sets out that the following types of processing should be performed with the use of databases located in Russia: collection, recording, systematization, accumulation, storage, adaptation or alteration, retrieval.

The Law on personal data does not prohibit the cross-border transfer of Russian nationals' personal data, but requires that such data are initially processed in primary databases in Russia. Russian law does not require the data controller to set up its own database. It may be either data controller's own database or third party's database (e.g. rented server facilities, cloud hosting etc.).

Moreover, it is a feasible option to ensure compliance with the localization requirement through the efforts of a third party, e.g., oblige a data processor contractually to ensure that data is processed in line with the localization requirement. The localization requirements cannot be contracted out with the consent of a data subject.

Notification of data protection authority (Roskomnadzor)

All data controllers shall register in the register of data controllers. For this purpose, they must file a notification to Roskomnadzor prior to commencement of data processing, unless processing falls under one of the exemptions from the notification provided by the Law on personal data. As a rule, such exemptions do not apply to Russian subsidiaries of foreign companies.

Notification shall be prepared in accordance with the statutory form signed by the head of respective Russian subsidiary and filed with Roskomnadzor. Each subsidiary must submit separate notification, umbrella registrations are not permitted.

Security measures

Information systems using which data controller processes personal data must ensure confidentiality and security of processed personal data, and shall comply with requirements of Russian laws. Therefore, controllers should undertake such legal, organizational and technical measures that are necessary to protect personal data against unlawful or accidental access and destruction, alteration, blocking, copying, provision or dissemination of personal data, and against other unlawful actions in relation to personal data.

Besides that, there are statutory established 4 levels of protection of personal data processed in filing systems (established in the Decree of the Russian Government No. 1119). Each level determines the particular security measures which must be undertaken. The required level of protection must be determined upon legal and technical audit of filing system and personal company's information system.

Data controllers are required to conduct an audit for compliance with Russian data protection requirements at least once every three years.

Data controllers may fulfil all information security requirements itself, or it may outsource this function to a specialised organisation having the required licences.

Things to remember

Control over compliance with data protection laws by Roskomnadzor

Russian laws set out the following ways of auditing compliance with Russian data protection laws, by companies:

- Scheduled audits/inspections. As a basic rule, companies may be audited once in three years. Certain companies may be subject to more frequent audits, in particular, companies transferring their data to "inadequate" jurisdictions.
- Unscheduled audits/inspections, upon an individual's complaint lodged with Roskomnadzor, or if Roskomnadzor reveals a violation of Russian data protection laws, by the company, during monitoring of the company's activities on the Internet.
- Monitoring companies on the Internet, or analyzing any available information about their processing activities, which may entail further Roskomnadzor's actions.

Sanctions

Violation of Russian data protection laws may entail the following sanctions:

- Administrative fines up to 18,000,000 Roubles (approx. 245,200 EUR) for a repeated offence in violation of the data localization requirement. This requirement implies that, upon collection, certain operations, using Russian citizens' personal data, shall be performed in databases located in Russia. In February 2020, Roskomnadzor imposed fines on Facebook and Twitter in the amount of 4,000,000 Roubles (approx. 44,355 EUR) each, due to violating the data localization requirement. In November 2020, Facebook paid a fine;
- Various administrative fines for other violations up to 500,000 Roubles (approx. 5,545 EUR). Separate fines are imposed for different types of offences. In addition, such fines may be imposed repeatedly, e.g. if separate administrative proceedings are initiated due to several individuals' complaints;
- Blockage of a website, or app, if personal data processing practices on a particular website, or app, are not compliant with Russian data protection laws – the best known example is LinkedIn, which has been blocked, in Russia, since November 2016;
- Forced suspension of unlawful data processing activities, upon Roskomnadzor's specific instruction;
- Criminal sanctions such as imprisonment and criminal fines, which may be imposed for unlawful access to computer information that resulted in destruction, blockage, modification or copying of computer information, as well as for illegal disclosure of information about an individual's private life. Criminal liability may be imposed only on individuals (company's officials): Russian laws do not imply any criminal liability for legal entities.
- Also individuals are entitled to claim damages caused by illegal processing of their personal data (inclusion moral damages) through the civil court.

ALRUD

White-Collar Crime

White-Collar Crime

Magomed Gasanov

Partner, Advocate, PhD in Law
Dispute Resolution, White Collar Crime, Compliance and Investigations
E: MGasanov@alrud.com
T: +7 495 234 96 92

Rules overview

Definition

Russian legislation does not contain such a term as "white-collar crime". Generally, such a term is used in marketing purposes and comprises corruption, money-laundering, economic and some other crimes, which could be committed by executives of legal entities.

Legal entities are not subjected to criminal liability in Russia. Therefore, their offences, formally speaking, cannot be included in the group of "white collar crimes". Despite this fact, legal entities could be subjected to civil, administrative or tax liability for violating anticorruption, tax and other legislation.

Regulation

The only source of criminal law in Russia is the Criminal Code of the Russian Federation. The Supreme Court of Russian Federation interprets provisions of the Criminal Code in a variety of Resolutions of the Plenum and judicial reviews.

Meanings of separate terms, used in the Criminal Code, are disclosed in other sources of law (for instance, specific safety rules, violation of which could entail criminal liability).

Besides the Criminal Code, Russian anti-corruption/AML ("Anti Money Laundering") regulation includes several laws and regulations, most notable of which are the federal laws "On Counteraction to Corruption" and "On Countering the Legalization (Laundering) of Proceeds from Crime and Terrorism Financing".

Corruption and money laundering

CORRUPTION

Russian legislation contains a wide range of prohibitions against corruption practices, including commercial bribery, bribery to foreign officials and money laundering.

The main federal body responsible for verification of the implementation of anti-corruption legislation is the State Procurator's Office and its territorial subdivisions. The Federal Financial Monitoring Service (Rosfinmonitoring) is the federal executive body responsible for combating money laundering and terrorist financing; developing and implementing state policies and regulatory/legal frameworks in this area; coordinating relevant activities of other federal executive bodies.

The State Investigative Committee and investigative body of Ministry of Internal Affairs investigate criminal cases involving corruption offences and money laundering.

Criminal liability for bribery is imposed by the Article 290 (accepting bribes), 291 (providing bribes), 291.1 (mediation in the bribery), 204 (bribery in a profit-making organization) of the Criminal Code of the Russian Federation. Sanctions vary from fines (up to 500,000,000 Roubles) to imprisonment (up to 15 years).

It should be noted, that Russian anti-corruption legislation does not make an exemption for facilitation payments, neither it is allowed to give a gift in exchange for certain actions, covered by job functions. Such actions could be considered to be evidence of bribes.

MONEY-LAUNDERING

Criminal liability for money laundering and terrorist financing is set out in Articles 174-174.1 (money-laundering), 175 (acquisition, or sale, of property acquired through crime), 205.1 (terrorist financing) of the Criminal Code. Sanctions prescribed in the Criminal Code vary from fines (from 300,000 Roubles up to 1,000,000 Roubles) to imprisonment (up to 15 years or more).

Companies can reduce risks of violation by implementing measures of anti-corruption compliance, including those, recommended in the guidelines of the Russian Ministry of Labour and Social Protection, which are found at the ministry's site.

Economic crimes

According to the data of the Ministry of Internal Affaires on criminal prosecutions in Russia for 2020, the enforcement bodies most frequently encounter the following economic crimes:

1. Swindling, that is, the stealing of other people's property, or the acquisition of the right to other people's property, by fraud, or breach of trust (24,461 crimes in 2020, but many of them were not linked to entrepreneurial activity);
2. Misappropriation, or embezzlement, that is the stealing of other people's property, entrusted to the convicted person (5,633 crimes in 2020);
3. Illegal enterprise, that is exercising business activities without registration, or without a license, where such license is obligatory, if this deed has inflicted major damage upon citizens, organizations, or the State, or is connected with deriving profits on a large scale (317 crimes in 2020);
4. Unlawful actions in case of bankruptcy, deliberate bankruptcy and fictitious bankruptcy (275 crimes in 2020).

Most of the economic crimes are linked to the financial and credit sphere (31,309 crimes), consumer markets (8,070 crimes), transactions with real property (7,178 crimes) and external economic activity (917 crimes).

Things to remember

- The number of inspections has decreased in recent years, but the number and total amount of administrative fines imposed on entrepreneurs continues to grow.
- The number of convictions for crimes in the economic field in 2020 decreased by 12,5 percent .
- Strengthening the fight against corruption in the private sector - in recent years the actions taken, to reduce violation of anti-corruption prohibitions, have been significantly tightened.
- Strengthening the coordination of actions of State bodies to identify latent crimes – collaboration of law enforcement and regulatory authorities, combined with automation of the processes of analysis of tax, financial and other information, reduced the possibilities for illicit business operations.
- Isolated cases of criminal prosecution of foreign businessmen – last year was marked by the continuation of the criminal prosecution of a number of foreign businessmen.
- It should be taken into account, that only attorneys, who have passed exams for entry to the regional bar and obtained special status of advocates, can provide legal defense in criminal cases. Russian laws protect only advocate-client communications. The law does not protect communications with persons without an advocate's status (including private practitioners and in-house counsels).

Recommendations

- Ensure the protection of significant information from unauthorized access (trade-secret regime).
- Provide an effective system of procurement and security of goods, works and services to minimize the risks of theft and other abuses by employees.
- Timely carrying out internal investigations of suspicious incidents to reduce the risks of legal consequences, gather evidence and prevent further violations.
- Obtain justifications of economic (organizational) feasibility of main business decisions and their legal goals.
- Introduce an effective system of combating corruption and other violations in the company, including specialized programs and organizational measures.
- Engage advocates in case of any investigative activity involving the company, or its employees.

ALRUD

Dispute
Resolution

Dispute Resolution

Sergey Petrachkov

Partner, Advocate, PhD in Law
Dispute Resolution, Restructuring and Insolvency
E: SPetrachkov@alrud.com
T: +7 495 234 96 92

Magomed Gasanov

Partner, Advocate, PhD in Law
Dispute Resolution, White Collar Crime, Compliance and Investigations
E: MGasanov@alrud.com
T: +7 495 234 96 92

Rules overview

Court system

According to the Constitution of the Russian Federation, justice in Russia is administered in the following forms:

- constitutional proceedings,
- civil proceedings,
- administrative proceedings and
- criminal proceedings.

Constitutional proceedings are carried out by the Constitutional Court of the Russian Federation and the regional constitutional (charter) courts, established in some regions.

Criminal cases are exclusively considered by the courts of general jurisdiction. Civil and administrative cases are considered either by the state commercial (arbitrazh) courts (hereinafter – "arbitrazh courts") or by the courts of general jurisdiction. They have different systems and structure, including a territorial presence division. However, the highest instance for both of them is a Supreme Court of the Russian Federation.

The choice between the arbitrazh courts and the courts of general jurisdiction, involving civil and administrative disputes, depends on the nature of the dispute and on the parties involved. The arbitrazh courts resolve business-related disputes. The parties are usually legal entities/individual entrepreneurs. The courts of general jurisdiction handle non-business matters, involving citizens.

Arbitration

Together with the state court system, Russian legislation provides an opportunity to resolve certain disputes by means of arbitration. Arbitration can be either institutional. or ad hoc. Institutional arbitration has a number of advantages, as compared to ad hoc arbitration, for example:

- the right to apply to the Russian state courts for assistance in obtaining evidence;
- the right to hear corporate disputes;
- the right to exclude the possibility of challenging the arbitral awards.

Apart from Russian arbitration institutions, business can use the facilities of HKIAC and VIAC. They both have recently obtained the status of permanent arbitration institutions (in terms of Russian law). They are entitled to hear:

- international disputes, with the seat of arbitration in Russia
- domestic disputes between the parties from "special administrative regions"
- a limited range of corporate disputes (disputes with regard to ownership over shares/stocks, disputes arising from shareholders agreements).

Initiating litigation proceedings

Proceedings start with filing a lawsuit, in the court at the defendant's place of residence (a regional arbitrazh court as a court of first instance for business disputes, e.g. Arbitrazh Court of the City of Moscow for business disputes, when a defendant is based in Moscow).

As for the monetary disputes considered by the arbitrazh courts, a mandatory pre-court complaint procedure is established, with 30 days, by default, to respond to the complaint. The claimant also should pay a State fee, the amount of which depends on the value of action. However, it does not exceed 200,000 Roubles. This might be later reimbursed from the losing party, as well as the legal fees. Other formal requirements, while filing a claim, should also be met.

It is important to note that only a person having a degree in law (bachelor, master, Ph.D) can represent interests in arbitrazh courts and in courts of general jurisdiction, starting from the regional courts level.

Review of the judicial acts

Civil procedure legislation offers the following means to review court decisions:

- Appeal proceedings;
- Two-stage cassation proceedings;
- Supervisory proceedings;
- Review on new, or newly-discovered, facts.

You should take into account that usually the next stage of review becomes available following the passage/exhaustion of all the previous stages.

Terms of consideration

Compared to other countries, litigation in the Russian Federation is a fast-track procedure taking significantly less time than State litigation takes in other jurisdictions. The average timetable of court procedure in the arbitrazh court is as follows:

Court instance	Average case duration
Court of 1st instance	No less than 3-4 months after filing a claim. Decision of the court of the 1st instance becomes effective after one month from the day it is issued, unless it is appealed in the court of appeal.
Courts of appeal → cassation → supervision instances	Plus 2-3 subsequent months, following the previous stage.

Enforcement proceedings

Once the court's judgment has entered into force, it can be enforced by the party by submitting the writ of execution, obtained from the court, either through:

- a bank, or other credit organization, where the debtor has an account;
- the Federal Bailiff Service.

If a debtor fails to voluntary fulfil its obligations, then enforcement proceedings shall be initiated by the Federal Bailiff Service.

Enforcement of foreign court judgments and arbitral awards

Russia is a party to the 1958 New York Convention, which allows it to recognize and enforce foreign arbitral awards. Recognition of foreign court judgments, in Russia, is subject to specific international agreements between the Russian Federation and the countries at issue. The reciprocity principle also may be applied, if mutual recognition is proven.

Things to remember

- Certain types of Russian corporate disputes can only be administered by permanent arbitration institutions, which have adopted arbitration rules for corporate disputes (for example: disputes arising from the incorporation, reorganisation and liquidation of legal entities and shareholders' derivative claims).
- Although the Russian Federation does not belong to common law countries, where the judicial system is largely based on precedent, court practice is rather important in Russia, as well.
- The Supreme Court has power to provide abstract "explanations" on both substantive and procedural law, outside the context of any particular case. They are contained in "rulings" or "decrees" of the Plenum (full bench).
- These explanations are treated as having a binding effect and are usually complied with by lower courts. A lower court that ignores a relevant "explanation" is taking the risk that its judgment will be reversed.
- The right to commence a civil action is usually limited to a three-year limitation period. The limitation period starts from the day when the person becomes aware, (or should have become aware) of the violation, of the respective right, and of the proposed violator. The limitation period cannot exceed 10 years from the date of violation of the right. The limitation period rule applies only upon a respective objection, from another party.

Recommendations

- Before filing a lawsuit, it is of critical importance to research the relevant court practice in your region, in support of your position. Remember that the court practice, on specific issues, can vary in different regions.
- In case of a major commercial project, or a matter with a complicated structure of relations between the parties, or a matter involving complicated legal issues, it might be reasonable to sign an arbitration clause/agreement establishing a respected arbitration institution's jurisdiction over possible disputes.
- Try to reach an amicable settlement where possible. This will significantly reduce your costs and will save you time.

About ALRUD

ALRUD is one of the leading full service Russian law firms, serving domestic and international clients. We stand for high quality advice, excellent service and rigorous ethical standards.

Established in 1991 by Senior Partners Maxim Alekseyev and Vassily Rudomino, ALRUD is widely recognized as one of the leading and most reputable Russian law firms.

We provide full scope of legal services to local and international clients in the areas of corporate/M&A, competition/antitrust, banking & finance, intellectual property, commercial law, data protection/cybersecurity, dispute resolution, inward investment, employment, restructuring/insolvency, real estate and tax.

Our clients include blue-chip multinationals, privately owned companies and Russian State-owned enterprises.

Outside of our domestic market, our clients are spread across Europe, Asia, North and South America.

ALRUD serves clients across a range of industries including energy and natural resources, mining, banking and finance, consumer goods and retail, investment management, government and public services, healthcare and pharmaceuticals, industrials, chemicals, technology, media and telecoms, transport and logistics.

Our strengths

Independent and international. We are one of the Russia's leading independent law firms, highly regarded in our domestic market and widely recognized for our expertise in complex cross-border transactions and international disputes.

Strength in depth. Our team extends to some 100 professionals, led by equity partners, who bring expertise and experience across the full range of legal services.

Teamwork and trust. We enjoy a collegiate culture which inspires us to provide innovative, practical and cost-effective advice. This has earned us our status as trusted advisers to our clients.

Global reach. Through our established relationships with leading international law firms across Europe, Asia and the US, we are able to draw on the skills of the best lawyers in all major jurisdictions around the world, working as an integrated team to provide our clients with an international service of the highest quality.

Multi-lingual approach. ALRUD provides legal services in English and Russian. We are also able to provide advice in multiple other languages including German, French, Japanese, Chinese and Korean.

ALRUD

Our Awards

Please be aware that all information provided in this brochure was taken from open sources. Neither ALRUD Law Firm, nor the authors of this brochure bear any liability for consequences of any decisions made in reliance upon this information.

Skakovaya str., 17, bld. 2, 6th fl., Moscow, Russia, 125040

T: +7 495 234 96 92, E: info@alrud.com

alrud.com