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Russian Legal Round Table: Developments

By Peter Spinella

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From sweeping new regulations in industries such as pharmaceuticals to the Civil Code revisions and migration amnesty law currently under discussion, Russia's legal environment is constantly changing. The Moscow Times posed four questions by e-mail to four Moscow-based lawyers specializing in different fields about new developments in their areas of practice. They noted trends including a greater attention to anti-bribery compliance among multinational firms, real estate limitations in Moscow that are pushing investment activity into the regions, and the ever-increasing use of English law in mergers and acquisitions.

1. What does your practice entail?
2. How has your field changed over the past few years?
3. How do you think it will change in the near future?
4. What major challenges do you face in your work?



Jonathan Nelms,
Associate, Baker & McKenzie
U.S. Foreign Corrupt Practices Act/Compliance

1.

I am one of a (relatively) new breed: the "compliance lawyer." Ever since various law enforcement authorities — particularly in Washington, D.C., my hometown — began to enforce the U.S. Foreign Corrupt Practices Act (FCPA) with great enthusiasm, the number of anti-corruption lawyers has grown exponentially, especially in Washington. To my knowledge, I am the only full-time compliance lawyer in Moscow.

My work consists of a) conducting internal investigations for companies whose business partners — or sometimes their own subsidiaries — are suspected of making improper payments; b) screening third-party business partners to ensure that the business partners do not expose our clients to involvement in bribery or other corrupt activity; c) developing anti-corruption and anti-money-laundering policies and procedures; and d) training local employees and business partners on our clients' anti-corruption policies.

2.

The compliance field has grown dramatically over the last few years. When I joined Baker & McKenzie seven years ago, nobody was dedicated full-time to compliance work. Now we have dozens of lawyers who spend substantial parts of their time — and many who spend all of their time — working on anti-corruption issues.

3.

Most importantly for those of us here, Russia acceded this year to the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials. The OECD expects to see enforcement of Russia's anti-corruption laws — amended last year to give the laws some real teeth — so we are looking for considerably more investigations and prosecutions of corrupt acts. We also expect to see greater sharing of information between Russian and U.S., U.K. and other foreign law enforcement.

4.

There was a time when even large bribes were paid in cash. We were able to detect and prevent those improper payments relatively easily. Those seeking and paying bribes got more sophisticated, so we had to learn to recognize and prevent bribes paid through more subtle means, such as sham service or resale agreements.

Our cooperation with Russia's Federal Anti-Monopoly Service over the last year or so has been enormously valuable to helping us understand this very competent agency's enforcement priorities and approach. Their investigations of anti-competitive practices often overlap considerably with anti-corruption enforcement. At the same time, we have worked hard to clarify for the service the compliance responsibilities faced by our clients from the U.S., the U.K. and other countries with increasingly active anti-corruption regimes in place.

These efforts have gone a long way toward making clear to FAS that performing comprehensive due diligence on a prospective business partner — and possibly rejecting or terminating such a partner due to corruption concerns — is not an anti-competitive measure but one meant to reduce corruption, a goal that should have the simultaneous effect of increasing real competition.



Yevgeny Zhilin,
Associated Partner, Law Firm YUST
Mergers & Acquisitions

1.
Our Corporate and M&A practice is primarily focused on acquisitions of midsized to large Russian businesses. Particular emphasis is added to corporate conflicts as well, especially where minority shareholders are seeking protection. A fair amount of work is done through debt restructurings where shares serve as a means of settlement of existing debts. New startups, particularly in the IT area, are a matter of priority as well.

2.
English law has been dominating in most of the M&A transactions, with international arbitration rather than domestic courts being agreed for adjudication. There have been a lot of smaller transactions for startups (ranging below 10 million or 15 million euros), and their number is expected to grow even further. There have been a lot more restructurings than before, with the number of "classical" M&As shrinking. The businesses are more and more willing to limit the scope of due diligence, accepting commercial risks and bargaining on indemnities.

3.
The field will become even more competitive with average fees going down. We hope that Russian law can be reinstalled and adapted to modern business needs, which hopefully would create some more work for truly Russian law firms. At the same time, the divergence between international and Russian firms will be washed out since most Russian firms will enhance their international capabilities. The securities market will develop with derivatives coming in first place. A lot of smaller stake acquisitions will be under way (rather than control purchases).

4.
The field has become much more competitive with many small to midsize players (law firms) emerging (partly as a spinoff of bigger firms, partly due to the enhanced presence of some international law firms).



John Hammond,
Senior Partner, CMS, Russia
Energy & Natural Resources

1.

We represented Gazprom on the asset swap it did with BASF, Shell on the disposal of a stake in the Sakhalin-2 project, and OMV on the sale of its Russian upstream interests. The other major achievement for us was to develop our energy dispute resolution team.

We use English law every day, and most of the agreements we draft and negotiate are under English law. In many cases, Russian law offers neither the flexibility nor the certainty to enable parties to give effect to the commercial deal they have reached.

I have even experienced Russian companies telling other Russian companies that their agreements have to be governed by English law and subject to international arbitration because they don't trust the Russian courts! As a general statement and drawing on our experience, that judgment is more than a bit harsh, but I don't see the reliance on English law changing at all in the foreseeable future — quite the reverse: As deals become increasingly complex, the demand for English law documents is only going to increase.

2.

The experience and expertise of the in-house teams at both Russian and international oil majors has grown exponentially. In the past, our interface was either with lawyers based at headquarters back in the U.K. or U.S., or with the commercial team on the ground. Now we deal almost exclusively with the in-house team in Russia. This is a clear signal of the market maturing and allows us to build our business on the model we use elsewhere: selling specialist, high-end services to sophisticated buyers who know the market.

3.

What we are seeing now is the beginning of a more cooperative approach to major upstream projects (for example, Exxon-Rosneft, Eni-Rosneft). This is because these projects are offshore, in deep water in the Arctic and far north and so are very demanding technologically and also hugely capital-intensive. The top Russian companies need access to Western technology and experts and also to capital in order to take on these projects. They also understand the advantages of sharing risk across a number of projects rather than risking all on one.

4.

The Russian legal system has developed rapidly, and the business world is recognizably international. Provided you can get to your meetings more or less on time, the rest is more than manageable.



Vitaly Mozharowski,
Partner, Goltsblat BLP
Real Estate

1.
“Common” real estate work: leases, mortgages, sales and acquisitions, construction contracts; large infrastructure projects; FDI (foreign direct investments) and industrial projects: strategic advice, selection of region or municipality, dealing with authorities, sites acquisition, design and construction issues, infrastructure and utilities, permits and licenses, environmental issues, subsoil; legislative work on federal, regional and municipal levels; and disputes and litigation.

2.
There is notably less FDI and international and institutional investors and a bigger importance of local noncore players on the real estate market. Due to development limitations in Moscow, investment activity moved to the regions.

3.
In the retail industry, [we will see] the rapid growth of volumes of online sales. Thus, the era of classic “big boxes” seems to be over in the midterm prospective. The vacant space, quite likely, will be occupied by the entertainment segment. In hotels, leisure and entertainment, [there will be] very active development, both in capitals and regions. This sector demonstrates more stability in the downturn and should be interesting for more conservative investors. Airports and transportation infrastructure have started to attract a lot of attention from local and international core investors and operators.

4.
The major problem is the day is limited to 24 hours.

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