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2016 LEGAL DEVELOPMENTS IN

RUSSIA, CENTRAL ASIA, UKRAINE AND BELARUS[1]

I. CORPORATE LAW

In 2016, Russian law underwent several changes aimed at modernizing the corporate legal framework and implementing the results of recent civil law reforms. The major changes related to (1) the transfer of participation interests in a limited liability company; (2) approving major and related-party transactions; (3) record-keeping regarding beneficial owners; (4) the so-called "Fourth Antimonopoly Package"; and (5) judicial case law.

1. Transfer of Participation Interests in an LLC

The rules pertaining to transferring participation interests in a Russian LLC have been revised to curb malicious corporate raiding.[2] First, as of January 1, 2016, a participation interest is deemed transferred when a corresponding entry is made in the public register, whereas previously, the transfer had occurred upon notarization of the transaction. This procedural change impacts the drafting of purchase agreements, particularly the provisions allocating risks prior to the transfer. Second, certain corporate actions became subject to public notary certification, including: (1) resolutions to increase a company's charter capital; (2) a participant's notice to withdraw from a company; (3) an offer to sell a participation interest to a third party; and (4) a participant's request for a company to buy out its participation interest.

Third, the structure of participation interest option agreements was clarified and improved. As of January 15, 2016, an option agreement for a participation interest may be accomplished through a notarized irrevocable offer which an offeree can subsequently accept through unilateral notarized acceptance. This limits the risk that the offeror changes its mind after granting the option but before the actual transfer.

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[2] These amendments were introduced by Federal Law No. 391-FZ "On Amendments to Individual Legislative Acts of the Russian Federation," dated December 29, 2015.

2. Approval of Major and Related-Party Transactions

Effective January 1, 2017, new regulations for major and related-party transactions have narrowed the scope of transactions subject to approval.[3] The definition of "major transactions" has changed from a firm threshold of 25% of the corporate assets' book value to a more sophisticated criterion. Specifically, a transaction is now considered "major" and subject to approval if it both: (1) results in the termination of the company's business or changes the type or scale of its business; *and* (2) exceeds 25% of the company's assets' book value.

With respect to related-party transactions, the new law abolished the requirement of prior approval by non-related participants and shifted the focus to reporting and subsequent control. In addition, whether a party is "related" with respect to a transaction will no longer require only a 20% or more "affiliation" with the relevant company. [4] Instead, the new rules require "control" of the relevant company, defined as controlling more than 50% of the governing body's votes and appointing the sole executive body and/or more than 50% of the collective management body.[5] In practical terms, this significantly decreases the number of related party transactions subject to pre-approval. Further, the law now requires the company to notify its board or shareholders of a contemplated related party transaction at least 15 days in advance.

The rules for challenging major transactions and related-party transactions also have been amended. To bring a claim, a shareholder (or group of shareholders) must hold no less than 1% of the company's share capital. This change is viewed by practitioners as a limitation of minority shareholders' rights, since there was no such threshold before.

3. Records of Beneficial Owners

As of December 21, 2016, Russian companies are required to identify and keep records on their beneficial owners.[6] A beneficial owner is defined as a person who ultimately owns, either

[3] Amendments were introduced by Federal Law No. 343-FZ "On Amendments to the Federal Law on Joint Stock Companies and the Federal Law on Limited Liability Companies as Related to Major and Related-Party Transactions," dated July 3, 2016.
[4] N.B., other criteria also applied in the former law. See Article 4 of RSFSR Law No. 948-1 "On Competition and Limitation of Monopolistic Activity on Product Markets," dated March 22, 1991.
[5] Article 81 of Federal Law No. 208-FZ "On Joint Stock Companies," dated December 26, 1995, with amendments taking effect on January 1, 2017.
[6] Federal Law No. 215-FZ "On Amendments to the Federal Law "On Combating Legalization (Laundering) of Illegally Gained Income and Financing of Terrorism" and the Administrative Offences Code," dated June 23, 2016.

directly or indirectly, a participation interest of more than 25% of an organization's share capital, or is able to control its actions. Russian companies are now required to: (1) undertake all reasonable and available measures to obtain information on the company's beneficial owners, including their complete names, citizenships, dates of birth, passport data, copies of immigration documents (if applicable), addresses, and taxpayer identification numbers; (2) update such information at least once a year; (3) retain such information for a minimum of 5 years;[7] and (4) provide supporting documents upon the request of relevant governmental authorities. This duty of identification is enforced through newly-introduced penalties of up to RUB 500,000 (approx. US$8,000) for failure to comply.[8]

4. "Fourth Antimonopoly Package"

Another set of legal changes pertains to antimonopoly (antitrust) law, where the so-called "Fourth Antimonopoly Package"[9] took effect on January 5, 2016. Specifically, joint venture agreements between competitors are now subject to prior approval of the Federal Antimonopoly Service (FAS) if they meet standard merger control monetary thresholds. Also, further transparency was applied to merger control filings, requiring the FAS to disclose on its official website certain information about transactions for which a request for approval has been submitted. Interested third parties now may submit statements relating to such transactions under review and their impact on competition.

5. Further Case Law Developments

The positive legislative changes described above have been accompanied by valuable clarifications from the courts, a few of which are worthy of mention. In a seminal case, the Supreme Court of the Russian Federation confirmed for the first time that the failure to vote in a manner agreed upon in a shareholders' agreement may result in contractual penalties.[10] Prior to this decision, it was unclear whether a court would enforce a monetary penalty for the breach of a

[7] The law does not clarify whether this requires companies to retain the information for five years from the time they acquire it, or for five years after the relevant person is no longer a beneficial owner

[8] Article 14.25.1 of the Administrative Offences Code, dated December 30, 2011, with amendments taking effect on December 21, 2016.

[9] Amendments were introduced by the Federal Law No. 275-FZ "On Amendments to the Federal Law "On Protection of Competition" and Certain Legislative Acts of the Russian Federation," dated October 5, 2015.

[10] Resolution of the Supreme Court of the Russian Federation No. 304-ЭС16-11978 in case No. A45-12277/2015, dated October 3, 2016, available at: http://kad.arbitr.ru/PdfDocument/7bc52a8c-0554-4f11-8f34-a68cd2c17897/A45-12277-2015_20161003_Opredelenie.pdf.

contractual duty to vote or act in a particular way. In fact, this was one of the first times that the Supreme Court interpreted any of the new provisions for corporate agreements that were introduced in mid-2014. In another case, the Supreme Court allowed a company's ultimate beneficiaries (i.e., those owning shares indirectly through a chain of foreign companies) to challenge corporate resolutions of the company's Russian subsidiaries in Russian national courts.[11] Previously, only direct shareholders could do so, which deprived ultimate beneficiaries of operational control over their subsidiaries.

II. ARBITRATION AND CIVIL PROCEDURE

A. Russia

Reforms to the Russian arbitration system were enacted by Federal Law No. 382-FZ "On Arbitration in the Russian Federation" ("Law 382-FZ")[12] and the related Federal Law No. 409-FZ "On Amending Certain Legislative Acts of the Russian Federation" ("Law 409-FZ").[13] These new laws have significantly affected domestic and international arbitration in Russia. Law 382-FZ replaced the existing law on domestic arbitration,[14] while the purpose of the Law 409-FZ is to bring existing laws, including the Law on International Commercial Arbitration (the "ICA Law"),[15] the

[11] Resolution of the Supreme Court of the Russian Federation No. 305-ЭС15-14197 in case No. A40-104595/2014, dated March 31, 2016, and available at: http://kad.arbitr.ru/PdfDocument/06923e6d-3151-417b-a665-2dc74aa80591/A40-104595-2014_20160331_Opredelenie.pdf.

[12] *See* Federal'niy Zakon RF "Ob Arbitrazhe (Treteyskom Razbiratelstve) v Rossiyskoy Federatsii" [Federal Law of the Russian Federation "On Arbitration in the Russian Federation" dated December 29, 2015, No. 382-FZ], ROSSIISKAIA GAZETA [Ros. Gaz.] December 31, 2015.

[13] *See* Federal'niy Zakon RF "O Vnesenii Izmeneniy v Otdel'niye Zakonodatel'niye Akti Rossiysoy Federatsii I Priznanii Utrativshimi Silu Punkta 3 Chasti 1 Stat'I 6 Federal'nogo Zakona 'O Samoreguliruyushihsya Organizatsiyah' v Sviazi c Prinatiyem Federal'nogo Zakona 'Ob Arbitrazhe (Treteyskom Razbiratel'stve) v Rossiysoy Federatsii'" [Federal Law of the Russian Federation "On Amending Certain Legislative Acts of the Russian Federation and Considering Paragraph 3 Part 1 Article 6 of the Federal Law 'On Self-Regulating Organizations' as Having Lost Its Force Due to the Adoption of the Federal Law 'On Arbitration in the Russian Federation'" dated December 29, 2015], ROSSIISKAIA GAZETA [Ros. Gaz.] December 31, 2015, No. 409-FZ.

[14] *See* Federalniy Zakon RF "O Treteyskih Sudah v Rossiyskoy Federatsii" [Federal Law of the Russian Federation "On Arbitration Tribunals in the Russian Federation"], ROSSIISKAIA GAZETA [Ros. Gaz.] July 27, 2002.

[15] *See* Federalniy Zakon RF "O Mezhdunarodnom Kommercheskom Arbitrazhe" (vmeste s "Polozheniyem o Mezhdunarodnom Kommercheskom Arbitrazhnov Sude pri Torgovo-promyshlennoi Palate Rossiyskoy Federatsii", "Polozheniyem o Morskoi Arbitrazhoi Komissii Pri Torgovo-Promishlennoi Palate Rossiyskoi Federatsii") [Federal Law of the Russian Federation 'On International Commercial Arbitration'(together with the "Regulations on Interntional Commercial Arbitration Court at the Russian Federation Chamber for Industry and Commerce", "Regulations on Maritime Arbitration Committee at the Russian Federation Chamber for Industry and Commerce")], ROSSIISKAIA GAZETA [Ros. Gaz.] August 14, 1993.

Arbitrazh Procedural Code,[16] and the Civil Procedure Code[17] into conformance with Law 382-FZ. The bulk of both laws took effect on September 1, 2016, with some provisions taking effect later.[18]

While updating the general arbitration framework, these reforms significantly impact the status of *ad hoc* arbitrations and streamline important issues pertaining to arbitrability of corporate disputes.

Under the previous version of the ICA Law, parties generally could refer the following types of disputes to international commercial arbitration:

(1) contractual or other civil law disputes arising from the parties' international economic activity, where at least one of the parties has a commercial enterprise abroad;
(2) disputes between enterprises with foreign investments, international associations and organizations established in Russia; and
(3) disputes between the participants of the entities listed in (2) and other parties.

The ICA Law expands this list to include disputes where a substantial part of the obligations arising from the relationships between the parties is to be performed abroad, or where the subject matter of the dispute is most closely connected with a foreign state. It also extends the scope of disputes pertaining to international investment that may be made subject to international commercial arbitration.[19]

However, amendments to the ICA Law still prevent parties from choosing the governing law for an international commercial arbitration as anything but Russian domestic arbitration law. International arbitration institutions such as the International Commercial Arbitration Court (the "ICAC") and the Maritime Arbitration Commission (the "MAC") at the Chamber of Commerce and Industry of the Russian Federation may consider domestic disputes, but examination of such disputes will be governed by domestic arbitration law.[20]

Law 382-FZ introduces new rules for the creation and functioning of arbitration institutions.Such institutions may be created only under the auspices of non-commercial

[16] *See* ARBITRAZNIY PROTSESSUALNII KODEKS ROSSIOSKOI FEDERATSII [APK RF] [Arbitrazh Procedural Code] (Russ.)
[17] *See* GRAZHDANSKII PROTSESSUALNII KODEKS ROSSIOSKOI FEDERATSII [GPK RF] [Civil Procedure Code] (Russ.)
[18] *See* Federal Law No. 382-FZ, *supra* note 11, art. 54; Federal Law No. 409-FZ, *supra* note 12, art. 13.
[19] *See* Federal Law No. 409-FZ, *supra* note 12, art. 2(3), (5); Federal Law No. 382-FZ, *supra* note 11, art. 44(18).
[20] *See* Federal Law No. 409-FZ, *supra* note 12, art. 2(6); Federal Law No. 382-FZ, *supra* note 11, art. 44 (18).

organizations and are required to obtain permission from the Russian Government,[21] although the law exempts the ICAC and the MAC from this requirement.[22] Arbitration awards rendered by arbitration institutions without the required permission will be treated as decisions made by an *ad hoc* arbitration.[23]

Ad hoc arbitrations are subject to a number of new limitations, among which are the following:

1. A party cannot waive its right to petition to a Russian court regarding the recusal of an arbitrator,[24] termination of an arbitrator due to inability to perform his or her duties,[25] or a challenge to a jurisdictional ruling[26] or revocation of an award;[27]
2. Assistance from the Russian court in collecting evidence is not allowed;[28] and
3. *Ad hoc* arbitrations cannot decide corporate disputes.[29]

Importantly, corporate disputes may only be considered by institutional arbitration.[30] Law 382-FZ generally covers which corporate disputes are arbitrable[31] and identifies some corporate disputes that must meet additional requirements in order to become arbitrable.[32] Other specific types of corporate disputes cannot be subject to arbitration, including:

1. Disputes related to convening general meetings of shareholders/participants or expelling participants;[33]
2. Disputes arising out of notary certification of transactions involving shares in limited liability companies;[34]
3. Disputes related to challenges of individual directives, decisions, and actions of state, local or similar governmental bodies, or public officials;[35] and

[21] Id. at Art. 44.
[22] Id. at Art. 44(1).
[23] Id. at Art. 52 (13), (16).
[24] Id. at Art. 13 (3).
[25] Id. at Art. 14 (1).
[26] Id. at Art. 16 (3).
[27] Id. at Art. 40.
[28] Id. at Art. 30.
[29] Federal Law No. 409-FZ, supra note 12, art. 9 (9).
[30] Federal Law No. 409-FZ, supra note 12, Art. 9 (9).
[31] Id. at Art. 9 (9).
[32] Id.
[33] Id.
[34] Id.
[35] Id.

4. Disputes involving a company included in the list of Russian strategic entities subject to Federal Law #57-FZ[36] (except for transactions with shares that are not subject to preliminary approval).[37]

Arbitration agreements on arbitrable corporate disputes may be entered into after February 2017.[38] Subject to the requirements of Law 382-FZ, an arbitration agreement can be part of a Russian company's charter binding on all shareholders.[39]

B. Kazakhstan

The Kazakhstan Civil Procedure Code (the "Civil Procedure Code" or the "Code") took effect on January 1, 2016. While retaining the basic concepts of the previous code, it introduces significant new items relating to trial procedure. One of the most important changes is a transition from the previous five-level judicial system[40] to a three-level judicial system comprising courts of the first instance, courts of appeal, and courts of cassation.[41]

The Civil Procedure Code provides that investment disputes[42] are under the jurisdiction of the court of Astana;[43] however, if a party to an investment dispute is a "large investor,"[44] then the investment dispute is subject to the jurisdiction of the Supreme Court of Kazakhstan.[45] The Code also encourages settling a dispute by amicable means. For instance, a judge is obliged to encourage the parties to reconcile a dispute at all stages of civil procedure.[46] A conciliation process called

[36] *See* Federal'niy Zakon RF "O Poryadke Osushestvleniya Inostrannih Investitsiy v Khozaystvenniye Obshestva, Imeyushiye Strategicheskoye Znacheniye dlya Obespecheniya Oborony Strany I Bezopasnosti Gosudarstva" [Federal Law of the Russian Federation "On the Procedure for Foreign Investment in Commercial Organizations of Strategic Importance for the National Security of the Russian Federation"], ROSSIISKAIA GAZETA [Ros. Gaz.], May 7, 2008.
[37] Id. at Art. 9 (9).
[38] Id. at Art. 13 (7).
[39] Id. at Art. 2 (8); The Federal Law No. 382-FZ, supra note 11, Art. 7 (7).
[40] *See* the previous civil procedure code of Kazakhstan (the "Old Civil Procedure Code"), Grazhdanskiy Protsessualnyi Kodeks Respubliki Kazakhstan № 411-I [], dated July 13, 1999 section 2 and chapters 40, 42-2, 43, 44.
[41] *See* Grazhdanskiy Protsessualnyi Kodeks Respubliki Kazakhstan № 377-V ZRK dated October 31, 2015 chapters 18, 52, and 54, http://online.zakon.kz/document/?doc_id=34329053.
[42] Predprinimatelskiy Kodeks Respubliki Kazakhstan ("Commercial Code"), Art. 296.1.
[43] Civil Procedure Code, Art. 27.4, http://online.zakon.kz/document/?doc_id=34329053.
[44] A "large investor" is an individual or legal entity making investments into Kazakhstan that total at least two million Monthly Calculation Indexes ("MCIs"). *See* id. Art. 274 (4). In 2016, one MCI was equal to 2121 Kazakh tenge. *See* Zakon Respubliki Kazakhstan o Respublikanskom Byudzhete na 2016-2018 godi dated November 30, 2015 №426-V [Law of Kazakhstan on the state budget], Art. 11 (4).
[45] *See* Civil Procedure Code, Art. 28 (2), http://online.zakon.kz/document/?doc_id=34329053.
[46] At the preparation stage, a judge explains to the parties in a dispute their right to enter into a settlement agreement, a mediation agreement, a participative agreement, or y apply to arbitration. Id. at Art. 165 (5). A judge is expected to

the "participative procedure" is established and is to be conducted with the assistance of the parties' attorneys through negotiations without the judge's intervention.[47]

The Civil Procedure Code also introduced a new, shorter written court procedure[48] which is like an ordinary proceeding but is simplified and conducted without the disputing parties present.[49] Only specific categories of cases may be resolved through this type of proceeding.[50] Another change regards the tendering of evidence to the court. Currently, evidence is tendered at the preparatory stage of litigation[51] and also may be proffered at the judicial examination stage if the proffering party was unable, for justifiable reasons, to provide it at the preparatory stage.[52] However, the Civil Procedure Code now mandates that a number of procedural actions, such as filing a counterclaim,[53] amending a claim,[54] and increasing or reducing claims[55] may occur only at the preparatory stage. At the same time, the preparatory stage has been lengthened from seven[56] to fifteen business days,[57] with the possibility of extending it up to one month in extraordinary circumstances.[58]

The Civil Procedure Code establishes a cap on the reimbursement of legal representation costs at 10% of the adjudicated amount in the case of material (property) claims, and no more than 300 MCIs[59] in the case of moral (non-property) claims.[60] In addition, new rules for calculating the state fee (i.e., filing fees and court costs) have been established for claims of moral harm caused by the dissemination of information discrediting one's honor, dignity and business reputation (similar to the western concepts of libel and slander). Prior to the enactment of the Civil Procedure Code, the state's fee for such claims was 50% of MCI,[61] but now it is 1% of the recovery requested

urge the parties to use one of these methods of conciliation and to assist in the settlement of a dispute at all stages of litigation. Id. at Art. 174.1.

47 Id. at Art. 181.2.
48 Id. at Chapter 13.
49 Id. at Art. 146.5.
50 Id. at Art. 145.1.
51 Id. at Art. 73.1.
52 Id. at Art. 73.1.
53 Id. at Art. 153.1.
54 Id. at Art. 169.1.
55 Id.at Art. 169.1.
56 *See* Old Civil Procedure Code, Art. 167.
57 Id. at Art. 164.1.
58 Id. at Art. 164.1.
59 See note 43.
60 Old Civil Procedure Code, Art. 113.1.
61 Tax Code [needs citation] at Art. 535.1 (7), http://online.zakon.kz/Document/?doc_id=39605522#pos=18314;-289.

for individuals[62] and 3% for legal entities.[63] The Civil Procedure Code does not require the payment of a state fee for filing an appeal petition, but the state fee is required when filing a cassation petition.

The Civil Procedure Code also has changed the effective date of a judgment from a court of first instance. Whereas the Old Civil Procedure Code allowed fifteen days for appeal following the issuance of a court judgment,[64] as a general rule, the new Code provides that a court judgment comes into force one month after the date on which the judgment was awarded in its final form.[65]

The Civil Procedure Code has expanded the powers of the appeals court. For example, that court now has the right to overturn a judgment and remand a case for reconsideration by a court of first instance in any of the following instances:[66] a case was considered by an improper composition of a court or in violation of jurisdictional rules;[67] a case was considered by a court of first instance in violation of the rules regarding language of court proceedings;[68] a court of first instance resolved a case regarding the rights and obligations of third parties not involved in the case;[69] or a judgment either was not signed by a judge or was signed by a judge who did not hear the case.[70]

The rules of procedure for the cassation courts have also undergone major changes. Generally, a cassation petition may be filed within six months of a judgment's effective date.[71] However, if the appeals procedure was not correctly followed by a party, the case usually will not be considered by a cassation court.[72] According to the Civil Procedure Code, the following types of cases also cannot be considered by a cassation court:

(1) a case considered through a simplified civil procedure;

[62] Id. at Art. 535.1 (15).
[63] Id. at Art. 535.1 (16).
[64] Id. at Art. 334.3.
[65] Civil Procedure Code Art. 240 and 403.3.
[66] Id. at Art. 424 (5).
[67] Id. at Art. 427.4 (1).
[68] Id. at Art. 427.4 (3).
[69] Id. at Art. 427.4 (4).
[70] Id. at Art. 427.4 (5).
[71] Id. at Art. 436.1.
[72] Id. at Art. 434.1.

(2) a case settled by settlement agreement, mediation agreement or participative agreement;

(3) a case abandoned by the renunciation of the claim;

(4) a case for material claims over 2000 MCIs for individuals and 30,000 MCIs for legal entities;

(5) a case regarding the settlement of the insolvency of a debtor; and

(6) a dispute arising from rehabilitative procedure and bankruptcy.[73]

However, the Civil Procedure Code establishes that the last two categories above (as well as certain other types of cases), regardless of appeal proceedings, may be considered by a cassation court at the initiation of the Chairman of the Supreme Court and the General Prosecutor[74] if a judgment may cause irreversible harm to the lives and health of the people, economy, and/or security of Kazakhstan, the violation of the rights and lawful interests of an indefinite number of people or other public interests, or the violation of the uniform interpretation and application of laws by the courts.[75]

III. PUBLIC-PRIVATE PARTNERSHIP LAW

Private participation in developing public infrastructure through public-private partnerships (PPPs) is currently a global trend, including in post-Soviet countries such as Russia and Belarus. According to United Nations data, more than 50% of the world's population now lives in urban areas, and all countries of the world are becoming increasingly urbanized.[76] This global phenomenon is changing the landscape and infrastructure of many developing countries, and in 2016 lawmakers in Russia and Belarus refined their respective legislation on Public-Private Partnerships (PPPs) to facilitate improvements in the quality of life of their current and future residents.

A. Russia

[73] Id. at Art. 434.2.
[74] Id. at Art. 434.3.
[75] Id. at Art. 438.6.
[76] United Nations, *World's Population Increasingly Urban with More Than Half Living in Urban Areas,* http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html, accessed on Nov. 7, 2016.

Until recently, PPPs in Russia were governed by Federal Law No. 115-FZ "On Concession Agreements," dated July 21, 2005 (the "**Concession Law**"),[77] which outlined the procedure for execution and implementation of PPPs in Russia at the federal level. The Concession Law allowed a concessionaire to develop and use a project which is or will be owned by the government, but allows only for a Build-Operate-Transfer ("BOT") model whereby private investors cannot acquire ownership of a PPP project. Several projects in Russia have been and are being executed using this BOT concession model, including the Western High Speed Diameter toll road [78] and the Pulkovo Airport[79] in St. Petersburg.

On January 1, 2016, the new Federal Law "On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and Amending Certain Legislative Acts of the Russian Federation" (the "**Russian PPP Law**") took effect.[80] Some provisions of the new Russian PPP Law are similar to the Concession Law, but there are some noticeable differences.

While the new Russian PPP Law will exist in parallel to the Concession Law, the Russian PPP Law allows for the ownership transfer from the government to a private partner (usually a project-specific or single-purpose company).[81] Whereas the Concession Law allowed only one PPP structure (BOT), the new law significantly expands the forms of PPP structures in Russia. It allows, among others, Build-Own-Operate (BOO), Design-Build-Own-Operate (DBOO), Design-Build-Operate-Transfer (DBOT), Design-Build-Own-Operate-Transfer (DBOOT), and Build-Operate-Transfer (BOT) structures.[82]

The Russian PPP Law mandates that only a Russian legal entity may be a private partner in a PPP project, with the exception of certain other Russian entities such as state or municipal unitary enterprises or institutions, or not-for-profit organizations created by the state or municipalities.[83] On the other hand, a concessionaire under the Concession Law may be Russian or foreign legal entities, unincorporated partnerships, and sole proprietors.

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[77] Federal Law № 115-FZ dated July 21, 2005 "On Concession Agreements," http://economy.gov.ru/minec/activity/sections/privgovpartnerdev/doc20050721_01, accessed on Nov. 7, 2016.
[78] Northern Capital Highway, *About WHSD: Western High-Speed Diameter Project*, http://nch-spb.com/eng/about-project/, accessed on Nov. 7, 2016.
[79] Pulkovo Airport, Saint Petersburg, *About the Airport: Public-Private Partnership Agreement (PPP Agreement)*, https://www.pulkovoairport.ru/en/about/agreement/, accessed on Nov. 7, 2016.
[80] Federal Law of the Russian Federation No. 224-FZ dated July 13, 2015 "On public-private partnership and municipal-private partnership in the Russian Federation and amending certain legislative acts of the Russian Federation," http://economy.gov.ru/en/home/activity/sections/ppp/, accessed on Nov. 7, 2016.
[81] Russian PPP Law at Art. 5.
[82] Id. at Art. 6.
[83] Id. at Art. 5.

The Concession Law allows the parties to a concession agreement to agree that disputes will be heard in Russian state courts or arbitration tribunals,[84] whereas the Russian PPP Law allows parties to a PPP agreement to choose any dispute resolution mechanism, presumably including arbitration by foreign tribunals.

In terms of financing and securing payments, the Concession Law does not allow the concession's project to be pledged to a financing party, but project developed under the Russian PPP Law may be pledged when a private partner secures the performance of its obligations under a separate agreement with the lender.[85] While there is a special tax regime for concession projects under the Russian Tax Code,[86] the Russian PPP Law does not contain any provisions relating to the taxation. Most likely PPP projects will fall under a tax regime created by different legal instruments (e.g. a combination of tax provisions in the Russian Tax Code, the Concession Law and other tax laws and regulations relating to infrastructure projects).

B. Belarus

Unlike Russia, where infrastructure development has always been recognized as an important economic growth mechanism, Belarus is only beginning to develop a legal framework regulating public infrastructure development. Belarus had no specific concession law before adopting its new Law on Public-Private Partnerships, which took effect in July 2016 (the "**Belarussian PPP Law**").[87] Before passage of the Belarussian PPP Law, the general Investment Code of the Republic of Belarus (the "**Investment Code**") regulated concessions.[88] However, until the Belarussian PPP Law, only mineral assets could be offered for concession;[89]termination/compensation provisions of project agreements were not clearly regulated, and very limited sources of government support were available.[90] Thus, the Investment Code was an insufficient legal basis for the development of PPP in Belarus and the new Belarussian PPP Law was adopted to provide specific guidance.

[84] Concession Law at Art. 17.
[85] Russian PPP Law, Art. 7.
[86] Tax Code of the Russian Federation, Part II, No. 117-FZ dated Aug. 5, 1000, at Art. 378.1, http://www.consultant.ru/document/cons_doc_LAW_28165/9019992fb9ee5eee0ec4a56daeecdf6e1a93d162/ in Russian), accessed on Nov. 8, 2016.
[87] Federal Law of the Russian Federation No. 345-3 dated Dec. 31, 2015 "On Public-Private Partnerships," http://www.pravo.by/main.aspx?guid=12551&p0=H11500345&p1=1 (in Russian), accessed on Nov. 7, 2016.
[88] See Articles 49 and 76 of the Investment Code of the Republic of Belarus No. 37-3, dated June 22, 2001, http://pravo.levonevsky.org/kodeksby/ink/20130317/index.htm (in Russian), accessed on Nov. 8, 2016.
[89] Id. at Art. 51.
[90] Id. at Art. 12-13. International arbitration, however, is possible for foreign investors under the Investment Code. Id. at Art. 46.

Under the Belarussian PPP Law, PPPs can be developed in various sectors, including transportation, public utilities, health care, agriculture, education, culture, energy, and telecommunications.[91] The Belarussian PPP Law provides certain roles for the President of the Republic of Belarus, Council of Ministers, Ministry of Economy, Ministry of Finance, and other governmental bodies.[92] The Belarussian PPP Law allows for transfer of infrastructure to a private partner for possession and use, although ownership rights remain with the government.[93]

The Belarussian PPP Law sets the following stages for PPP project development:

(1) Preparation, review and valuation of tender offers relating to PPP projects;

(2) Decision relating to development of a PPP project;

(3) Tender process by which a private partner for a PPP project will be selected; and

(4) Execution and performance of the PPP agreement.[94]

The Belarussian PPP Law allows many agreement provisions to be negotiated freely between the parties, but some provisions are mandatory. For example, the governing law of the PPP agreement must be Belarussian law,[95] and the PPP agreement must be registered with the Ministry of Economy.[96]

Financing of PPP projects in Belarus may be done by a Belarussian or foreign entity in full or in part.[97] A private partner will enjoy all guarantees generally provided to investors, including guaranteed money transfer and protection against nationalization.[98] The Belarussian PPP Law also provides guarantees for creditors of a private partner.[99] In addition to litigation, international arbitration is one of the dispute resolution mechanisms provided by the Belarussian PPP Law.[100]

Initially, seven PPP pilot projects were planned in Belarus,[101] however, currently only one transportation project is being developed: upgrading an 85-km section of the M10 road, an international transport corridor and alternative route between the EU, Belarus, Russia and China.[102] As a result of the Belarussian PPP Law, the World Bank, the European Bank for Reconstruction and Development (EBRD), and the International Finance Corporation (IFC) are engaged in supporting this project. A private partner

[91] Belarusian PPP Law at Art. 5.
[92] Id. at Art. 2.
[93] Id. at Art. 25.
[94] Id. at Art. 6.
[95] Id. at Art. 24.3.
[96] Id. at Art. 24.4.
[97] Id. at Art. 26.1.
[98] Id. at Art. 36.
[99] Id. at Art. 37.
[100] Id. at Art. 39.
[101] National Agency of Investment and Privatization of the Republic of Belarus, *7 Pilot PPP Projects Chosen in Belarus*,http://www.investinbelarus.by/sp/press/news/c70f38b1f4ed8e30.html, accessed on Nov. 8, 2016.
[102] European Bank of Reconstruction and Development, *Bank will help prepare key road project and will also consider providing finance*, http://www.ebrd.com/news/2016/ebrd-to-help-belarus-prepare-first-ppp-m10-road.html, accessed on Nov. 7, 2016.

will design, build, operate, and maintain the motorway section and in return receive an "availability fee" from the Belarussian authorities.[103] The tender is expected to occur in the first half of 2017.[104]

Despite many unknowns, the Belarussian PPP Law and engagement of international organizations in the first PPP pilot project in Belarus provide an opportunity to global investors to assess regulatory and political risks for investment in Belarussian PPPs.

Conclusion

While it is too early to analyze the effects of the new Russian PPP Law and the Belarusian PPP Law, it is important that PPPs in Russia and Belarus now extend beyond concessions. The new PPP Laws provide universal terms and principles and an expanded list of acceptable PPP structures, as are found in PPP legislative frameworks in developed countries that are PPP pioneers. The new PPP Laws are aimed to attract more private investors and funds to both Russia and Belarus, and to improve Russian and Belarusian infrastructure.

IV. ENERGY LAW

A. Ukraine

In 2016 Ukraine continued implementing the European Energy Community's Energy Directives, primarily aimed at liberalizing the Ukrainian energy market. In addition, the ongoing conflict with Russia in eastern Ukraine continues to have significant impact on the energy market and the overall economy of the country. Ukraine's main priority is improving its energy security, including an increase in its own gas production. In late 2015, Tax Code reforms were adopted mandating decreases in gas production payments that had been enacted in 2014 and were largely seen as unreasonable.[105] In addition, legislative amendments aimed at simplifying the process to obtain a license for gas production were developed.

[103] In PPP transportation contracts, "availability fee" or "availability payment" refers to a project delivery method where a governmental entity makes fixed payments to a private contractor for performance of the project irrespective of demand. For more information see Silviu Dochia and Michael Parker, *Introduction to Public-Private Partnerships with Availability Payments*, http://www.pwfinance.net/document/research_reports/9%20intro%20availability.pdf, accessed on November 21, 2016.
[104] Id.
[105] Section IX of the Tax Code of Ukraine provides for: the payment for extraction of natural gas to be sold to industrial consumers (to be paid by natural gas producers) has been reduced from 28-55% to 14-29% (depending on the extraction depth) as of January 1, 2016, and to payment for extraction of natural gas to be sold to households reduced from 70% to 50% (for extractions up to 5 km deep) as of April 1, 2016 and to 29% as of January 1, 2017. See *Tax Code of Ukraine, Law No. 2755-VI, ch. 9 (2010) (Ukr.), available at: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=35&nreg=2755-17*.

Another very important development in the energy sector concerns restructuring of the Ukrainian oil and gas monopolist the NJSC "Naftogaz," which will be carried out pursuant to the new law "On the Natural Gas Market"[106] and the Third Energy Package[107]. Unbundling gas transportation activity from gas production and supply should increase the transparency and investment attractiveness of the sector.[108] Investors are particularly interested in this reform because Ukrainian legislation provides that a foreign legal entity may own up to 49% of the operator of the Ukrainian gas transportation system. Another sign that Ukraine is opening its gas market is that in 2016 a significant number of private traders entered Ukraine in order to import gas from Europe, demonstrating that NJSC "Naftogaz of Ukraine" no longer has a monopoly on importing gas.[109]

The Ukrainian electricity market underwent significant changes on September 22, 2016, when two important laws were approved by the Parliament. First, Draft Law "On The National Commission For State Regulation Of Energy And Utilities (NCSREU)"[110] was adopted, statutorily mandating NCSREU's existence (as opposed to the previous situation of its existing only by regulation) in order to fulfill Ukraine's commitment as a party to the Energy Community. The law also sets out a transparent procedure for appointing and rotating members of NCSREU, ensuring that the regulator is professional, transparent, and independent. The second important law was Draft Law No. 4493 "On the Electricity Market of Ukraine," which envisages a gradual transition from the current system of state-owned electricity purchaser[111] to a privatized model of operation

[106] See *Law "On the Natural Gas Market", Law No. 329-VIII, ch. 9 (2015) (Ukr.), available at* http://zakon5.rada.gov.ua/laws/show/329-19.

[107] As a member of the European Energy Community since February 1, 2011, Ukraine undertook to implement a number of European Union Directives in the energy sphere (the so-called "Third Energy Package"), by means of Directive 2009/73/EC concerning common rules for the internal market in natural gas; Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks; and Directive 2004/67/EC concerning measures to safeguard security of natural gas supply.

[108] On September 22, 2016 the Cabinet of Ministers of Ukraine passed Resolution "On Certain Issues of Managing NSJC "Naftogaz of Ukraine" providing for the transfer of 100% shares of the company to the Cabinet of Ministers of Ukraine. See *Resolution "On Certain Issues of Managing NSJC "Naftogaz of Ukraine", Resolution No. 675, (2016) (Ukr.), available at*: http://zakon2.rada.gov.ua/laws/show/675-2016-%D0%BF.

[109] See Naftogaz Annual Report 2015, *available at:* http://www.naftogaz.com/files/Zvity/Naftogaz-Annual-report-2015.pdf.

[110] See Law "On The National Commission For State Regulation Of Energy And Utilities, *Law No. 1540-VIII, (2016) (Ukr.), available at*: http://zakon5.rada.gov.ua/laws/show/1540-19.

[111] Historically, the state enterprise Energorynok bought all of the electricity produced in Ukraine (as a wholesale purchaser) and sold it to electricity supply companies (suppliers), who then sold it to customers. Purchased energy is sold by Energorynok to 27 oblast energy companies (Oblenergo) and suppliers licensed to supply electricity with unregulated tariffs (as independent suppliers). Oblenergo's sell electricity to final consumers with regulated tariffs. The new Law allows power producers to sell their electricity directly to the suppliers through freely negotiated bilateral

using direct supply agreements, a market for "day-ahead" contracts, and a balancing market. These reforms will provide more transparency and healthier competition in the electricity market.

In mid-2016 the State Property Fund of Ukraine announced a new "oblenergo" (electricity supply company) sale schedule.[112] Currently the State Property Fund of Ukraine is preparing for privatization six electricity supply companies, three large hydro-electric power plants, and state co-generation power plants and coal mines.

As an unusually large energy consumer, Ukraine was required by the International Monetary Fund (IMF) to increase its tariffs on energy sources for private households to an economically viable level.[113] Therefore, energy efficiency has become a more important issue in Ukraine, attracting investment such as international financial institutions and Ukrainian banks providing financing for energy efficiency and renewable energy projects. Aiming to increase the share of renewable energy in the country's energy balance, last summer, despite Ukraine's economic crisis, the new government adopted legislative amendments that demonstrate its support for the development of renewables. Consequently, the renewable energy sector, together with "green" tariffs, is still attractive for the investors.

V. DATA PRIVACY AND RELIGIOUS FREEDOM LAW IN RUSSIA

On July 7, 2016, Russian President Vladimir Putin signed into law new counter-terrorism legislation[114] commonly referred to as the "Yarovaya Law" (Federal Law No. 374-FZ)[115] after its principal sponsor, arch-conservative senator Irina Yarovaya. The Yarovaya Law amended Russian existing federal laws on data retention and added restrictions on religious freedom. Most of the

contracts, bypassing Energorynok entirely. Thus, the producer and supplier mutually decide on the price, volume, and terms of the supply.

[112] The oblenergo (power company) sale schedule was approved by Order No.774 dated April 15, 2016 regarding amendments to SPFU Order No.42 dated January 12, 2016 "On approval of the schedule chart to offer objects of "B" and "Г" groups for sale in 2016."

[113] The Resolution of the National Commission for State Regulation of Energy and Utilities No.2201 dated February 26, 2015 provided for increasing electricity tariffs in five stages. At its meeting on 27 April 2016 the Cabinet of Ministers decided to set the unified gas price for population at the level of UAH 6879 per thousand cubic meters. The mentioned price will be effective as of 1 May. The tariffs will constitute 100% of the "parity from import" price and will include inter alia the cost of gas transportation through pipelines and taxes.

[114] https://themoscowtimes.com/articles/federation-council-approves-controversial-anti-terrorism-laws-53505.

[115] Federal Law No. 374-FZ, http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=1039101-6; http://asozd.duma.gov.ru/addwork/scans.nsf/ID/2DD578844A4BD88D43257FF5003FD13E/$File/1129774-6.PDF?OpenElement.

amendments took effect on July 20, 2016, although some (such as those relating to storage of metadata) will not take effect until July 1, 2018.[116]

Telecommunications Portion of Yarovaya Law

The telecommunications section of the amendments requires "telecom providers" and "internet arrangers"[117] to:

(1) allow access to communicated information (such as telephone calls, email messages, text messages, etc.) by Russian government investigators and prosecutors;
(2) Stop providing communication services to any user who fails to respond to a request by investigators or prosecutors to confirm that user's identity;
(3) To maintain inside the Russian Federation:
    a. For three years (in the case of telecom companies) or one year (for internet providers), the metadata information confirming transmission, receipt, delivery and processing of voice data, text messages, pictures, video, sound, or other communications;
    b. For six months, the actual contents of such communications[118]

In addition, the law requires the providers to supply any other information "which is necessary for these authorities to achieve their statutory goals" and to assist the authorities with decoding the data provided.[119] Violation of these provisions can result in an administrative fine of

[116] Ksenia Koroleva, "'Yarovaya" Law' – New Data Retention Obligations for Telecom Providers and Arrangers in Russia," Latham & Watkins LLP Global Privacy & Security Compliance Blog, (2016), available at http://www.globalprivacyblog.com/privacy/yarovaya-law-new-data-retention-obligations-for-telecom-providers-and-arrangers-in-russia/

[117] The term" telecom provider" is defined in Federal Law No. 126-FZ "On Communications" dated July 7, 2003, as a legal entity or a sole proprietor providing communication services under a Russian license pursuant to Governmental Decree No. 87-FZ "On Approval of a List of Communication Services Subject to a License and Rules and Procedures for Receipt of License" dated February 18, 2005. Receiving, processing, storing, transferring, or delivering any physical or electronic communications qualifies as communication services. The term "internet arranger" is defined in Federal Law No. 149-FZ "On Information, Information Technology and Data Protection" dated July 27, 2006, as a person facilitating the functioning of information systems and/or software that is used to receive, transmit, deliver and/or process electronic messages of internet users (social media is an example).

[118] This requirement will take effect on July 1, 2018 (or possibly July 1, 2023 if a current draft law seeking such postponement is passed). Ksenia Koroleva, "'Yarovaya" Law' – New Data Retention Obligations for Telecom Providers and Arrangers in Russia," Latham & Watkins LLP Global Privacy & Security Compliance Blog, (2016), available at http://www.globalprivacyblog.com/privacy/yarovaya-law-new-data-retention-obligations-for-telecom-providers-and-arrangers-in-russia/

[119] Federal Law 374-FZ.

up to one million rubles.[120] Arguably, failure to maintain or provide more than one communication (e.g., several emails) could be viewed as multiple violations, but this is yet to be tested.

An uproar ensued over the passage of these provisions on legal, technical, and financial terms. One of the major controversies over the Yarovaya Law is that it appears to extend to all telecom or internet providers who facilitate any communication from or to Russia, thus encompassing foreign providers such as Google, Facebook, Yahoo, and many others.[121] Many of these companies are located in countries which forbid, on privacy grounds, the tracking and maintenance of certain communications covered by the Russia law (such as telephone calls), putting these global providers in a position of having to violate either their own country's laws or Russian law (if they are to continue operating in Russia).[122] One western operator, Private Internet Access, immediately discontinued its business in Russia.[123]

Religious Portion of Yarovaya Law

The Yarovaya Law also places restrictions on religious activities outside of designated places of worship.[124] The amendments to Russia's Religion Law[125] require that "missionary activity" can only be done "without hindrance" at churches and other religious sites designated by the chapter, and that it is expressly forbidden to perform missionary activities in private homes. "Missionary activity" is defined as "the activity of a religious association, aimed at disseminating information about its beliefs among people who are not participants in that religious association, with the purpose of involving these people as participants. It is carried out directly by religious associations or by citizens and/or legal entities authorized by them, publicly, with the help of the

120 Irina Yarovaya's "anti-terrroist" war on civil rights, June 22, 2016, Meduza, https://meduza.io/en/feature/2016/06/22/irina-yarovaya-s-anti-terrorist-war-on-civil-rights; "Russian minister expects no rise in telecom prices due to new anti-terror law", July 7, 2016, Tass Russian News Agency, http://tass.com/economy/886926.

121 J. Tabastajewa, "Yarovaya Law: Russian Parliament passes package of laws on data retention obligations", Lexology, September 12, 2016, http://www.lexology.com/library/detail.aspx?g=f07d1a93-af0c-46da-b1e9-c2ad78c50437.

122 Id.

123 "We are removing our Russian presence," Privacy Online Forums, July 11, 2016, https://www.privateinternetaccess.com/forum/discussion/21779/we-are-removing-our-russian-presence.

124 Brandon Showalter, "Christians in Russia Under Attack from Putin's Law Banning Evangelism Outside of Churches," The Christian Post, July 21, 2016, available at http://www.christianpost.com/news/russia-charges-american-pastor-under-new-anti-evangelism-law-170362/.

125 Federal Law No. 125-FZ of September 26, 1997 on the Freedom of Conscience and Religious Associations, as amended 2008, legislationline.org/.../id/.../RF_Freedom_of_Conscience_Law_1997_am2008_en.pdf

media, the internet or other lawful means."[126] Missionary activities may only be performed by authorized members of registered religious groups and organizations. Thus, only state-registered religious groups and organizations may engage in such religious expression.[127] The amendments prohibit even informal sharing of beliefs, such as responding to a question, by individuals.[128] Citizens are required to report unauthorized religious activity to the government, or face fines.[129] The law also increases the punishment for those engaging in "extremist" activity, a term used in the past to prosecute Muslims and Jehovah's Witnesses.[130]

Violation of the religious portion of Yarovaya's Law can result in a fine of up to 50,000 rubles for individuals (about six weeks' wages for the average Russian) or one million rubles for organizations.[131]

[126] Id. V. Arnold, "Russia: Anti-Sharing Beliefs Law First Use", ISKON News, August 24, 2016, http://iskconnews.org/russia-anti-sharing-beliefs-law-first-use,5760/

[127] The amendment particularly affects Protestants and Jehovah's Witnesses in Russia, who often do not have their own permanent buildings. V. Arnold, "Putin Signs Sharing Beliefs, 'Extremism', Punishments," Forum 18 News Service, July 8, 2016, http://forum18.org/archive.php?article_id=2197.

[128] Id.

[129] K. Shellnutt, "Russia's Newest Law: No Evangelizing Outside of Church," Christianity Today, July 8, 2016, http://www.christianitytoday.com/gleanings/2016/june/no-evangelizing-outside-of-church-russia-proposes.html.

[130] 1997 Law, supra note 130.

[131] E. Clark, "Russia' new Anti-Missionary Law in Context" August 30, 2016, Religious Freedom Institute, https://www.religiousfreedominstitute.org/cornerstone/2016/8/30/russias-new-anti-missionary-law-in-context.