

NEWS & VIEWS

BANKRUPTCY THE RUSSIAN WAY BY VASSILY RUDOMINO – SENIOR PARTNER ALRUD LAW FIRM

The amendments to Russian Federal Law “On the insolvency (bankruptcy)”, adopted and came into force in January, 2009, affected both general and procedural provisions of the Law.

We at ALRUD Law Firm provide full professional service at the highest level for our partners therefore we ought to analyze the impact and the consequences of these substantial changes of the procedure of bankruptcy.

With regard to the general provisions, state bodies should now for free provide information on a debtor to a bankruptcy commissioner within a seven days' term since the moment of receipt of a query from the latter one.

The second and quite important amendment sets out that all liabilities of a debtor occurred prior to the date of entry of the first insolvency stage (procedure) should now be recorded into the creditor's claims register. This rule brings the Law in line with the application practice existing in other European countries and provides for all creditor's claims occurred prior to commencement of the first insolvency stage shall be satisfied by the debtor based on the *pari passu* principle.

With regard to procedural provisions, one should pass an introduced uniform procedure of consideration by arbitration court of the reasonableness of a bankruptcy petition and of establishment of an observation procedure. Such procedure shall be applied both while filing for bankruptcy by a debtor itself and while filing a creditor's application (before the observation procedure could be applied only in case if claims of the applicant (including the debtor) deemed reasonable). Moreover, the amended Law provides for an option to any third party to fulfill the debtor's obligations to repay the compulsory payments (obligations to pay taxes and fees) during any of existing bankruptcy stages without simultaneous satisfaction of the debtor's obligations to other creditors what was required by the previously effective revision of the Law.

The Law has substantially changed a position of the secured creditors. Now they have no right to vote within the certain insolvency procedures commencing



after the observation stage (they take part in creditors' meetings without vote) given that within the financial restructuring and external management stages of insolvency proceedings secured creditors are granted the right to choose either to enforce the secured claims or to participate in the corresponding proceedings with a right to vote at creditors' meetings. According to the Law it is now possible to enforce the security (pledge) during all stages of insolvency save for the observation and winding up stages solely under the court decision issued within the frameworks of the insolvency case where the court may deny an enforcement provided that it leads to impossibility of debtor's solvency recovery.

The order of debtor's assets disposal has also been changed radically. The idea of electronic tenders where the most part of debtor's assets shall now be sold has been introduced. Furthermore, the amended Law simplifies the procedure for sale of the debtor's assets should the tender where such assets were announced to be sold fail.

Key IT issues to Consider from a Purchaser's Perspective By Dr Sam De Silva - specialist technology and outsourcing lawyer at Taylor Walton LLP

There is little doubt that IT is crucial to most modern businesses. If you are considering the purchase of a business by way of an asset purchase, the issues relating to the transfer of those IT systems should be one of your priorities. In our experience, there are often a number of challenges in establishing how best to transfer IT systems and such issues are usually considered at the last minute. Best practice shows us that you should start considering the IT transfer issues sooner rather than later. The following are some issues worth considering:

1. Importance of the IT system to the business

Due diligence may reveal that either the IT system is ancillary to the operations of the business or the business may be fully dependent on it (for example, a business in the financial services sector). You will need to decide whether to acquire the target's IT system outright or whether its func-

tions can be replicated by your own IT systems. You may need to operate or access the target's IT system for a limited period following sale of the business to allow for a phased migration of the systems and data to your own IT system. This will require a separate transitional services arrangement.

2. Mechanics of transfer

You will need to consider the detailed mechanics of how the rights to use the various components of the IT system are transferred. The acquisition of hardware and IP rights owned by the seller is fairly straightforward. The transfer of hardware owned by the seller may be included as one of the assets to be transferred in the business sale agreement. Copyright in any software owned by the seller can only be validly transferred by specific written agreement.

The acquisition of licensed software and leased equipment is

not so straightforward. This is because the contractual arrangements relating to licensed software and leased equipment of the target company will usually only permit use by an authorised user. Therefore, any leases, licences or other service agreements will need to be either novated or assigned. Various consents may be required and/or extensions to existing licence arrangements may be needed to enable your business to use the IT system following the acquisition of the target business. In our experience vendors sometimes use this opportunity to levy additional charges, which in some cases could be significant.

3. Timetable

If the transaction timetable is tight, it may not be possible to novate or assign all relevant contracts before the transaction is completed. One of the challenges is that the deal could be so confidential that the parties do not wish to seek third party consents to such transfers ahead of completion. In either situation, you could consider:

- requiring the seller to procure, or assist you in procuring, all necessary consents to the transfer of the IT system after completion; and/or
- negotiating appropriate indemnities or retaining some of the purchase price to be set off against any consent fees or the costs incurred in obtaining new licences or leases.

Attention to above issues should go some way in managing your risks relating to the transfer of IT issues in an acquisition.

The information in this article is not intended to constitute professional legal advice and should not be relied upon as such. Specialist legal advice should always be sought for your particular circumstances.