I. Training of Arbitration Court Judges carried out by the Russia Corporate Governance Facility (RCGF): Terms of Reference and Current Status

Background

The Russia Corporate Governance Facility (RCGF) is a European Union funded TACIS project. It started in February 2004 with the overall objective to improve the legal, institutional and regulatory framework for corporate governance in Russia, to disseminate good CG principles as embodied in the Russian Code of Corporate Conduct ("Code"), and to put into practice the requirements as outlined in the Code. The project is to do so by focusing on the key requirements in the Code; by reinforcing the institutional capacity of the main project partner, the Federal Financial Markets Service ("FFMS"); by addressing the difficulties encountered by the FFMS and the Judiciary in enforcing good and fair practices in CG. In addition, the project provides support to the development of a more coherent legislative framework for corporate governance in the Russian Federation.

Training programme for Arbitration Court Judges

One of the specific aims of the RCGF is to increase awareness of CG issues and improve understanding in the Judiciary when it comes to dealing with corporate disputes related to main CG principles and best practice. The terms of reference for the project specifically refer to "the difficulties in the judiciary in dealing with the rapid growth of commercial litigation and enforcement of existing rules and laws". This is a well-known problem which troubles foreign and domestic investors alike and in itself greatly contributes to the generally unfavourable view of protection of property and contractual rights in the Russian economy. A related problem concerns the remaining inconsistencies and conceptual differences between sections of law, having been introduced from different legal systems. This sometimes creates confusion on matters of authority and legal interpretation.

In designing its training seminars for Arbitration Court Judges the project has sought to support and improve the capability of the Judiciary in a practical way, based on concrete discussion of the possibilities for effectively handling corporate litigation cases relating to main CG principles within the existing Russian legal system, complemented by experiences from European jurisdictions.

Two training events have been carried out so far:

1) Training Seminar for Judges of the Arbitration Courts of the North-West Region in cooperation with the Supreme Arbitration Court (SAC), St. Petersburg, 7-8 December, 2004;

2) Training Seminar for Judges of the Arbitration Courts of the Ural Region in cooperation with the Supreme Arbitration Court (SAC), Yekaterinburg 19-20 April 2005;

The respective programmes for these two seminars are attached to this document. A third seminar is planned for the Vladimir region in October 2005. This last seminar will be followed by a closing high-level expert meeting with participation by the SAC, the FFMS and European experts for an in-depth discussion of the interface between corporate legislation and corporate governance. The participation by experts from the OECD Roundtable on Enforcement of Corporate Governance Rules at this high-level seminar would be warmly welcomed.

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II. Experience and Impact : Preliminary Assessment

Content and Format

The programmes for the seminars were elaborated in a co-operative effort between the SAC and the project experts. They offered a wide array of subjects of interest for the participating judges, covering the various stages in the life of a joint stock company, such as incorporation and reorganisation (including mergers and acquisitions), related party transactions, placement of shares, payment of dividends, control issues and the role and liability of the Board of Directors, information disclosure and the limits of shareholders' rights. The programmes allowed for discussions of different aspects of shareholder rights and their protection.

Beneficiaries of the training were in both cases a group of 20-25 judges working in the respective regional Arbitration Courts.

The seminars were set up as a Round Table discussions. The speakers from the SAC introduced the subject, highlighted some of the violations of shareholder rights occurring in courts around Russia and the proposed solutions to problems of interpretation in cases of the absence of clear guidance by the law.

After the introduction of a subject by the SAC speakers, the floor was opened for discussion and questions from the audience. Participants discussed SAC Plenum decisions as well as specific questions raised by some of the judges arising from their own practice.

European experts gave presentations on developments in their own jurisdictions with respect to CG and company law issues. They also provided feedback on the discussion from a European (especially Dutch and German) perspective, elaborating on similar cases in their own court systems and explained how such conflicts were usually solved. In some cases with more specific Russian problems they were able to offer advice from a European vantage point.

Participants' Evaluation

It appears that both of the selected regional Arbitration Courts are presently dealing with a larger number of cases than their Moscow colleagues, with less than half the staff for the task. Although SAC training takes place at regular intervals, regional judges have little time and opportunity to reflect on their own cases and decisions handed down to them by the SAC Plenum. One indication of the necessity to create more training opportunities for judges is the fact that all participants stayed from the beginning to the end and several asked when the next seminars would take place. A concrete indication that the seminars served urgently felt needs are the consistently high evaluation scores handed in by the participants.

Although the contribution of the European experts was extremely important it is difficult to estimate its impact on the audience. A certain shyness or reserve seemed to provide some restraint in the communication, in addition to the language barrier. The lack of more practiced facilitation and summing-up techniques by the Russian chair caused some of the comments to 'fall dead' despite excellent translation services. This is more a matter of tradition and approach to interaction and should not reflect negatively on the SAC experts and speakers who were of high professional quality. However, at times the focus of the seminars tilted too much towards simply passing on information. It must also be noted that the speakers from the SAC did indicate a few times that they are not in possession of all the answers, which seemed to be an eye-opener to some of the participants.

Comments and Recommendations by European Experts

The European experts were struck by the very formalistic approach taken by the Russian judges and noted that the latter appear to be looking exclusively to the letter of the law in the implementation of Russian legislation. This makes it difficult to find a way of introducing fundamental principles such as "fair and reasonable" (*spravedlivost* and *razumnost*) and "good faith" (*dobrasovestnost*) into the discussion, let alone into the exercise of their profession. The experts recommended introducing more explicitly into the agenda discussion items on these issues, such as the extent to which these fundamental principles have influenced the development of case law in other jurisdictions.

Another comment made was that the cases for discussion were to varied and it would be advisable to preselect a few cases which would allow a discussion of issues such as the role of the judiciary vis-à-vis statutory law, abuse of shareholder rights, etc.

Preliminary Conclusions

The main objective of this project component is to give the judges an opportunity to look at their work in implementing the law from a different perspective, gaining some first-hand experience with the concepts and principles of corporate governance. In this respect, the project is already reaching its objectives. However, the conduct of the seminars could be more dynamic. To the extent the seminars aim to encourage and equip participants with tools to use discretion in cases where the law gives no guidance or is difficult to interpret, the current format does not serve well. Discussions often turned into either questions and answer sessions or debates. Conclusions were only sporadically voiced. It might not fit the 'culture' of the Arbitration Courts to change their hierarchical relationships which seem to preclude free and constructive dialogue. Ways should be developed to get around this obstacle, since for effective court practice at all levels, as well as for continuous development and improvement of court practice, the skills necessary for making qualified independent decisions are crucial.

As to content, the project team agrees that the concepts of 'in good faith' (*dobrosovestnost'*) and 'reasonability'(*razumnost*') could be addressed in more detail and applied to the Russian context in certain prepared cases.

Furthermore, there is a case for involving higher level court judges in these more conceptual discussions, as the experience shows that lower court judges have more direct interest in discussing problems around the particular cases arising in their own practice. For this purpose, the idea of conducting a high-level seminar with European experts, which in addition to SAC experts also could incorporate experts from FFMS, the Ministry of Economic Development and Trade, the Duma and other higher level policy makers seems a good suggestion.

Seminar for the Judges of the Arbitration Courts of the North-West region of the Russian Federation

"Corporate Law and Governance"

7-8 December 2004, St. Petersburg

PROGRAMME

DAY 1.

9.00 a.m. - 1.00 p.m. (10.30-11.00 – coffee break)

Establishment of Joint-Stock Companies. The composition of founders of the JSC & requirements they are to meet. The restriction of participation in the JSC.

Restructuring of the Joint-Stock Companies. The forms of the reorganization. The protection of the shareholders' and creditors' rights in the company, during the procedure of its reorganization.

1.00 p.m. - 2.00 p.m. – Lunch

2.00 p.m. - 5.00 p.m. (3.30 p.m. - 4.00 p.m. – coffee break)

The order of authorized capital stock formation. The conditions of shares' issue when the JSC is created & when the authorized capital stock is increased. The practice of settling the arguments about the declaration of invalid issue of shares or placement of shares transactions.

DAY 2.

9.00 a.m. -1.00 p.m. (10.30 a.m. - 11.00 a.m. – coffee break)

Shareholders' interest. Right for dividends. The rights of the shareholders in case when the JSC decides to purchase the shares previously placed. The right of the shareholders to demand the redemption of stock by the JSC. Shareholders' right of priority in purchasing the placed shares & securities, convertible into shares. The rights of the shareholders concerning the execution of supervision over the JSC's arrangement of the major deals & related parties transactions.

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1.00 p.m. -2.00 p.m. – Lunch

2.00 p.m. - 5.00 p.m. (3.30 p.m. - 4.00 p.m. – coffee break)

The right of shareholders to participate in the JSC's management. Entry of the owner into the shareholders list. The right to participate in the general shareholders' meetings. The right of an access to the information concerning the JSC's activities.

The scope & limits of the realization of rights by shareholders. Are all the shareholders' rights subjected to the legal defense?

SEMINAR "CORPORATE LAW AND GOVERNANCE"

for judges of the Arbitration Courts of the Ural Region
of the Russian Federation

19-20 April 2005
Yekaterinburg

PROGRAMME

Day 1, 19 April 2005

10:00-13:00 (11:30-11:45 coffee-break)

- What is 'Corporate Governance', the difference with the concepts 'Corporate Law' and 'Corporate Management';
- The basic generally accepted international standards and principles of Corporate Governance;
- Economic feasibility of introduction of Corporate Governance standards. Regulation of Corporate Governance issues in Russia and abroad.

- Decisions of the governing bodies of the company;
- Lawsuits on cancellation of decisions of the General Meeting of Shareholders;
- Cancellation of decisions of the Board of Directors and executive bodies of the joint stock company.

13:00 – 14:30 Lunch

14:30 – 17:00

- Issues of liability of members of the Board of Directors and executive bodies;
- Problem of determining the extent of liability;
- Concepts of 'in good faith' and 'reasonability'.

- Problems of holding a parent company liable for activities towards its subsidiaries
- Liability of managing companies.

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Day 2, 20 April 2005

10:00-13:00 (11:30-11:45 coffee-break)

- Disputes, related to company transactions, for which special legal procedures are established;
- Problems with control transactions in which control is acquired, Art. 80: Problem of fair evaluation of the buy-out price;
- Redemption rights of shareholders; problem of valuation of bought shares (not merger or take-over);
- Major transactions, especially the problems of relating activities to the 'regular business activity', determination of price of assets by the Board of Directors and related-party transactions; Problems with the definition of affiliated parties, when the major transaction simultaneously is considered a related-party transaction, are buy-out rights applicable?
- Other cases of contest of company transactions by its shareholders.

- Recording the rights to securities;
- Register of shareholders;
- Agreement on register keeping;
- Liability of issuer, register holder, depositary (nominal holder) for keeping the register.

13:00 – 14:30 Lunch

14:30 – 17:00

- Protection of shareholder rights during reorganization;

Procedural issues on the consideration of corporate conflicts
- Jurisdiction of corporate conflicts;
- Characteristics of application of application of restraining orders;
- Possibility to use provisions from internal documents, including the corporate conduct code of the company during consideration of conflicts;
- What to do in cases, when internal documents do not contain necessary provisions.