

ClientInsight

10 – 16 October 2011

Russian Legislation Update

Court Practice

Loan Agreements

On 13 September 2011 the Presidium of the Supreme Commercial Court issued Information Letter No. 147 approving the overview of court practice regarding loan agreements between banks and corporate borrowers.

The Letter contains a number of important clarifications regarding loan agreements between banks and corporate borrowers or individual entrepreneurs, including the legality of charging borrowers various fees and the legality of loan acceleration if a borrower breaches certain contractual undertakings.

In particular, the Court clarified the following:

- *A borrower may request deletion of exceedingly onerous terms from the loan agreement if it had no chance to negotiate those.* If a borrower has no opportunity to affect loan agreement terms which grossly impair the balance of the parties' interests, the borrower may request the court to delete such terms from the agreement (e.g., where such terms allow the bank to unilaterally increase the interest rate or reduce the maturity at its own discretion and without explaining any grounds);
- *Banks should act reasonably and in good faith when unilaterally changing lending terms.* In exercising its contractual right to unilaterally change lending terms, the bank is to act reasonably and in good faith (e.g., in a particular case, the bank failed to meet this test when it significantly reduced the maturity so that the borrower had to repay the entire loan, amounting to its annual profit, within a few days of the bank's notice, and also increased the interest rate twofold; as a result, the court dismissed the bank's claim to recover the loan, interest and penalty);
- *Commitment fees are legal.* A bank is entitled to charge separate fees, along with loan interest, only to the extent they represent a charge for rendering a standalone service to the client or may be considered payment for the use of loan (e.g., in a particular case lump-sum fees for considering the loan application and for granting the loan were found to be illegal, whereas a commitment fee and a fee for maintaining the loan account (ssudniy schet) payable on a recurrent basis were found to be legal; in another case, a monthly overdraft fee was found to be legal);
- *When a loan is repaid early, interest is to be paid for the period until repayment (rather than the entire loan term).* If a borrower repays its loan early, it may request the bank to refund the interest paid for the time when the loan is not used anymore (in a particular case, this happened because the borrower made annuity payments which included interest for the entire loan term);

In This Issue...

- **Court practice: Loan Agreements**
- **First Reading: Waste**

For more information please contact:

Igor Ostapets

Partner

iostapets@whitecase.com

Irina Dmitrieva (Tax)

Partner

idmitrieva@whitecase.com

White & Case LLC
 Tel +7 495 787 3000
 Fax +7 495 787 3001
www.whitecase.com

- *When a loan is accelerated due to the borrower's breaches, interest may be charged for the time after the repayment.* If the bank accelerates the loan due to breaches by the borrower, the court may charge subsequent interest, i.e., for the period after the actual repayment, depending on the losses suffered by the bank due to the breaches (e.g., in a particular case, the court charged future interest to the extent of lost profit being the difference between the higher rate set in the loan agreement and the lower rate set for similar loans at present);
- *A breach of contractual undertakings may result in acceleration of the loan.* The terms of a loan agreement allowing the bank to accelerate the loan if the borrower breaches its contractual undertakings, such as the undertakings to maintain certain financial indicia, refrain from granting sureties and pledging its assets, are legal;
- *The bank is to compensate losses to the borrower in case of a groundless refusal to grant the loan.* If the bank refuses to grant a loan in the absence of circumstances demonstrating that the loan will not be repaid when due, the borrower may recover losses from the bank (in a particular case, such losses were calculated as the difference between the interest rate under the initial loan agreement and the rate set in the loan agreement concluded by the borrower with another bank instead);
- *The amount of increased interest may be reduced by the court.* An increased interest rate accruing in case of the borrower's delay in loan repayment as established under the loan agreement is regarded as a penalty (neustoyka) and may be reduced pursuant to Article 333 of the Civil Code based on the particular circumstances of the case;

- *A loan may be repaid by a third party (not the borrower).* The bank is entitled to accept loan repayment from a third party who is not a borrower, and such third party may not recover the payment back from the bank if an agreement between that party and the borrower serving as a basis for such payment is found invalid thereafter.

The Information Letter will serve as a guideline for lower commercial courts when they consider similar cases.

First Reading

Waste

On 7 October 2011 the State Duma adopted in the first reading Draft Law No. 584399-5 amending the Federal Law "On Production and Utilization of Waste."

The Draft Law aims to introduce measures to economically stimulate companies to reduce their waste generation through recycling and to mitigate any adverse environmental impacts in the course of waste disposal. In particular, the proposed amendments seek to oblige producers and sellers of reusable packaging materials (e.g., reusable glass and plastic bottles) to assure their acceptance from consumers with reimbursement of their value. The amendments also seek to impose liability on producers (importers) of goods for a failure to utilise, neutralise and (or) dispose of hazardous goods. In addition, the amendments intend to release companies from the duty to pay for an adverse environmental impact if waste is disposed of at environmentally safe facilities (e.g., landfills) capable of offsetting such impact.

The provisions of the Draft Law will apply if adopted by the State Duma in three readings, approved by the Federation Council, signed by the President, and officially published.