

# The Russian Concession Law – Some Comments

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# Outline

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- Introduction
- Main features of the concession law
- Some comments
- Shortcomings
- Recommendations
- Conclusions

# Introduction

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- ❑ So far, no special law devoted to concessions in Russia
- ❑ However, concessions are already operational in Russia
- ❑ Legal basis so far:
  - Civil Code (freedom of contract; equality of all parties, including the state)
  - Foreign investment law (national regime, protection of foreign investment, no expropriation, nationalization only for adequate, prompt and effective compensation)

# Main features of the law (I)

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- ❑ Signed into a law on 21 July 2005
- ❑ Entry into force as per 1 January 2006
- ❑ General provisions
- ❑ Scope of the law
- ❑ Definition of concession agreement
- ❑ Object of concession agreement – immovable property only
- ❑ Structured after BOT model
- ❑ Parties to the concession agreement (grantor [*concedent*] and concessionaire)

# Main features of the law (II)

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- Duration of the concession (7-99 years)
- Concession fee
- Rights and obligations of the parties to the concession agreement
- Control on the execution of the concession agreement
- Terms of the concession agreement

# Main features of the law (III)

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- Amendment and termination of the concession agreement
- Settlement of disputes
- Guaranties
  - Equal treatment and non discrimination
  - Grandfather's clause (for 7 years as from the date of conclusion of the concession agreement)
  - Conclusion of the concession agreement

# Main features of the law (IV)

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- Procedure for the conclusion of the concession agreement
- Tender procedure
- In exceptional cases, no tender required
- Conclusion of the concession agreement

# Some Comments (I)

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- Relationship with Civil Code
  - Impression exist that concessions will be outside civil law domain and rather within the administrative law domain
  - “soglashenie” (agreement) rather than civil law “dogovor” (contract)
  - As a result, civil law principles would not apply (protection of ownership, equality of parties, no arbitrary interference, change of circumstances (Article 451 Civil Code), etc)

# Some Comments (II)

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- ❑ However, under Article 3 (4), concession rights must be registered as a charge on the right of ownership
- ❑ Should it, therefore, be considered a right *in rem* under Article 216 of the Civil Code?
- ❑ Consequence: protection under Article 305 of the Civil Code (“protection of the rights of a possessor who is not an owner” – protection also vis-à-vis the owner)

# Some Comments (III)

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- Settlements of disputes:
  - Objects of concessions are immovable property only
  - As a result, Russian law shall apply
  - Also, Russian courts shall have exclusive jurisdiction (i.e., no foreign arbitration shall be allowed)
  - Settlement within administrative law domain?

# Some Comments (IV)

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- ❑ Should the concession law be considered a general law with subsequent sectoral laws?
- ❑ Under Article 2, other laws must be in accordance with the present law
- ❑ However, this would restrict flexibility

# Shortcomings in the law (I)

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- ❑ Relationship with Civil Code unclear
- ❑ Restricted to immovable property only
- ❑ Pledge on the concession object is not allowed
- ❑ Objects constructed under the concession agreement shall be owned by the grantor and not by the concessionaire

# Shortcomings in the law (II)

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- Intellectual property rights acquired during the concession shall belong to the grantor (unless the agreement provides otherwise)
- As regards control, a number of issues have not been provided for:
  - tariff setting and control;
  - guarantee period of construction;
  - performance standards;
  - equal treatment of customers;
  - disclosure requirements, etc.

# Shortcomings in adjacent laws

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- ❑ Budget Code – further elaboration of Articles 115ff will be required (guaranties)
- ❑ Tax Code – no preferential regime for concessionaires
- ❑ Adjustment of anti-trust law will be needed allowing concessionaires to operate as (quasi-)monopolists
- ❑ Public property is still poorly defined and delimited

# Some recommendations (I)

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- Put concessions within the civil law domain
- Do not limit concessions to immovable property only
- Allow pledging of the concession object
- Do not restrict concessions to BOT models only

# Some recommendations (II)

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- ❑ Draw up a model concession agreement
- ❑ Insert an explicit provision allowing foreign arbitration
- ❑ Address shortcomings in related laws (Budget Code, Tax Code, Competition Law, etc)

# Conclusions (I)

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- ❑ The law covers all essential issues
- ❑ It is unclear whether concessions are within the domain of civil law or rather administrative law
- ❑ The provisions on rights and duties of the concessionaire seems to detailed
- ❑ It would be better to include these in a model concession agreement

# Conclusions (II)

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- The enabling legislation is more or less in place (although property issues need further attention)
- Related laws need further adjustment, including
  - Tax Code
  - Budget Code
  - Competition Law