Central and Eastern Europe

Even before the financial crisis firms such as Linklaters were reconsidering their presence in Central and Eastern Europe. Now, many such firms have downsized or closed their offices there. But for domestic firms, the recession presents an opportunity. **p 84**

Expert Opinions

The article is followed by expert opinions where leading practitioners from across the continent provide updates on the latest legal and regulatory issues in their jurisdictions.

The Chain Bridge across the Danube in Budapest, Hungary

CENTRAL AND EASTERN EUROPE

The bad news and the good

Kyiv. Bogdan Khmelnitsky statue and St Michael's cathedral.

The last two years have seen international firms retrench through most of Central and Eastern Europe. But it is not all bad news. Domestic firms are flourishing and some countries are still attracting big international players to the region. **TOM WHITTAKER** reports

The fact that international firms continue to re-evaluate their positions within Central and Eastern Europe (CEE) implies that the regional legal market took a particularly hard hit in the recession. But this is not necessarily the case.

Magic circle firms, eager to increase their presence in CEE during the boom, have closed several offices and have made hundreds redundant.

"We do not believe that the CEE market will be attractive for large international players any

"Those firms who relied on international business are really the ones that shed blood and had a severe downturn in their profitability."

Georg Diwok, head of finance, Baker & McKenzie, Vienna

time soon," says Michael Kharenko, a partner at Kyiv-based law firm Sayenko Kharenko.

"The legal market is very competitive, and not all of the firms operating in the region are able to generate enough client work."

But while international firms retrench, the legal market carries on. Clients are providing domestic firms with increasing amounts of restructuring work. Redundancies and office closures by internationals provided domestic firms with new staff and led to the creation of new firms. Meanwhile, some CEE countries are already beginning to glimpse a post-recession environment that is attracting attention from international firms.

The bad news

Between 2003 and 2008 the CEE region saw a five-fold increase in foreign direct investment inflows (FDI), rising from US$30 billion to US$155 billion. For international firms these were peak years for business in the region as large, profitable, cross-border work flowed in. To accommodate this demand the firms expanded their presence – opening new offices and hiring new local staff on competitive wages.

But then the financial crisis came. 2009 saw FDI for the region slump by 50% to US$77 billion and large cross-border work from international clients disappeared.

"International firms in Ukraine have got almost all their work from their foreign offices, not from here within the country," says Mikhail I. Ilyashev, managing partner at Ilyashev & Partners. "Due to the decrease of foreign investment and foreign economic activities, and the termination of some investment projects, their work has dried up."

Georg Diwok, head of the banking & finance practice group at Baker & McKenzie Diwok Hermann Petsche in Vienna, agrees: "Those firms who relied on international business are really the ones that shed blood and had a severe downturn in their profitability."

The work that is still available is outside international firms' typical areas of interest. Large cross-border banking & finance, M&A and real estate work all evaporated in the wake of the financial crisis. Real estate took a particularly bad knock, with FDI declining by a massive 71% in 2009 compared to the previous year.

With demand for their services disappearing and clients increasingly demanding lower fees, competition between firms grew. As fees went down and the disimilarity between revenues from the CEE and other regions expanded, international firms lost interest. Many began to retrench.

The first indication that international firms were rethinking their CEE position came in May 2008 with the news that Linklaters would scrap four of its CEE offices after a reassessment of its presence in the region. In 2009 Linklaters also saw its Warsaw office shrink by ten lawyers over six months, including two partners.

Clifford Chance followed in July 2009 by closing its Hungary office in order to concentrate on other areas. Later the same year the magic circle firm cut the pay of lawyers and support staff in the Warsaw office by 10% in order, it argued, to bring pay levels in line with the rest of the Polish market.

Even Baker & McKenzie, considered to be the big hitter of the internationals in the region, has had to clean house. February 2009 saw the firm cut eight staff members, including three associates, in its Kyiv office.

"Baker & McKenzie are important players in the Ukrainian market and even they have cut personnel. They have certainly lost a lot of work," says Mikhail I. Ilyashev, managing partner at Ilyashev & Partners.

The firm has downplayed redundancies in the country by claiming that they would have been necessary regardless the effects of the recession.

Mikhail I. Ilyashev, managing partner at Ilyashev & Partners

"Pulling out of regions which no longer provided reasonable returns became an important part of some firms' approach."

Mugur Filipescu, managing partner, Voicu & Fillipescu

"We would have laid them off anyway. Those who are strong, who will survive, we will keep," says Alexandr Cesar, a partner in Baker & McKenzie's Prague office.

Most domestic firms are not reading too much into the moves by international firms. "With the past year's economic situation having a severe impact on international firms, it was only natural for their attention to shift towards maintaining positions on their home markets," says Mugur Filipescu, managing partner at Romanian firm Voicu & Filipescu.

"Pulling out of regions which no longer provided reasonable returns became an important part of some firms' approach."

But Cesar points out that while major international firms have had to re-evaluate their strategies in the country none of the major firms have yet left due to a competitive environment.

"Frankly, no one has yet left the region because of this competition. The only exception was Linklaters, but that was not because of a lack of work. It was because they wanted to change their corporate structure."

Domestic firms doing well

The situation of domestic firms has improved with the recession. With clients now concentrating on driving down spending they began drifting further away from international firms. Domestic firms, with low overheads in comparison to internationals, can afford to provide services at a far more attractive price.

"We are getting more assignments from the clients that would otherwise have approached international law firms," says Dr Andrey

New challenges of new Russian legal business

Alexander Sutiagn
Andrey Gorodissky & Partners

Legal business in Russia and the former Soviet republics is relatively young as its inception coincided with the collapse of communism in those countries. This year legal business in Russia turns 20 while passing through one of the harshest periods in its development.

As in various other emerging economies, the legal profession in Russia was particularly in demand for serving the needs of businesses in corporate law matters in the high-profile and lucrative transactions of mergers and acquisitions and capital markets. The lawyers operate in the rapidly evolving economy which is characterised by the enormous concentration of assets and lack of sustainable business ethics. Before the onset of the crisis, the legal sector greedily consumed its share of the growing economic pie and took advantage of excessive liquidity on the market, which inevitably led to a trend for mega-deals and the development of large legal practices.

Once the signs of economic turbulence appeared, legal business in Russia was adversely affected immediately. M&A and capital markets business shrank rapidly, encouraging the reallocation of practices from those recent flavour-of-the-month areas to less attractive areas that were still in demand, such as litigation, bankruptcy, debt restructuring, etc.

What are the rules of the new order the players have to observe to stay in the game?

First, a lawyer can hardly expect an assignment unless a capped fee arrangement is proposed and agreed. Billable-hour fee arrangements are mainly a thing of the past, and all-inclusive capped fee budgets predominate. Law firms who request the right to ask for upward adjustments to fees, in the event of unforeseen events or additional work, risk discouraging clients from using them.

The bottom-line message of the clients is that service providers are expected to share the client's risks rather than stay independent from, and immune to, the world's turbulence. The client is looking for a service with predictable and transparent costs, where their outside consultants are bearing the risks of the business along with them. Hourly rates are left for the internal accounting of law firms and partnerships, and may be used for the purposes of revenue distribution among the partners.

Eventually, the tightening measures are intended to cut legal costs, and lawyers should be fairly aggressive in pitches. The reality is that there is no room for fee negotiation and the clients make a decision on the competitive bids immediately and pick the lowest offer without bargaining and giving the peers a chance to revisit the fees proposal for further discounts.

Second, the very nature of assignments has switched from high-profile M&A projects to routine litigation, restructuring and basic housekeeping. This stems from new business realities characterised by stagnation and continuous defaults and breaches. General counsel are more and more restrained in budgeting outside counsel's services while their workloads are rising. As a result, clients are strengthening their in-house teams by hiring more experienced staff, aiming at handling as many legal matters internally as possible. Major Russian companies' general counsel confess that the work they give to outside counsel is currently limited to M&A, cross-border debt restructuring and in some cases complex litigation.

Third, although belts have been tightened, corporate clientele have also become more demanding in the assessment of the quality of legal services, the seniority of the lawyers involved and the technical infrastructure in place. Deep specialisation of practitioners has resulted from the ongoing development of laws and regulations.

Russian law making and law enforcement practice have substantially improved over the past ten years, amid criticism as to the quality of such fast and unpredictable improvements. The shrinking of legal business inevitably means more competition among law firms struggling for assignments in a marketplace where the client is king, with authority to deal with legal service providers at its discretion and for its own, frequently current rather than strategic, interest. Law firms are selected on a competitive basis in the same manner as other providers and costs centres, without regard for the sensitive and delicate nature of legal advising. Clients' choices of law firm are permanently changing, with cost efficiency increasingly the overwhelming criterion for selection.

Fourth, legal business is considering new opportunities which come along with difficulties. The legal community in Russia is excited about a possible consolidation of the sector which may occur in the near future.

All in all, the Russian legal profession is looking forward to the new challenges of an ever-changing world. ■

By Alexander Sutiagn at Andrey Gorodissky & Partners

"We are getting more assignments from the clients that would otherwise have approached international law firms."

Dr. Andrey Gorodissky, managing partner, Andrey Gorodissky & Partners

Dr Andrey Gorodissky, managing partner at Andrey Gorodissky & Partners.

Gorodissky, managing partner at Andrey Gorodissky & Partners in Moscow.

The particular practices in demand by clients work to their favour. Unlike international firms, domestic firms have a larger share of lawyers practising restructuring and litigation law.

"I think the clients naturally think that the local firms are more orientated towards these areas," says Ondrej Peterka, managing partner at Peterka & Partners in Prague.

Domestic firms say they are seeing at least a 20-25% increase in litigation work since August 2008. Local firms are even moving finance teams into restructuring work to cope with the extra demand.

And while the new work will not be making colossal changes to the revenues of domestic firms it has left them financially secure during the recession and in a position to develop over time.

"This trend helped us to avoid salary cuts and staff reductions in 2009, and even made it possible for us to hire two new middle-level lawyers in 2010," says Andrey Gorodissky & Partners' Gorodissky. "Now we are considering further strengthening of our legal team."

Redundancies from international firms also resulted in increasing numbers of young, talented lawyers with experience at an international level looking for new jobs. Domestic firms gladly took them on.

But even before the recession domestic firms were in an opportune position. In fact, Andrzej Wiercinski, a senior partner at Polish firm Wiercinski, Kwiecinski, Baehr, argues that domestic firms have been attracting lawyers from internationals for sometime.

"For a couple of years during the last decade there has been a trend of experienced and well-trained lawyers moving from international law firms to domestic practices," he says.

He also argues that the generation change within companies has introduced a client demand that is less concerned with big-name, international brands: "One cannot forget about the change of generation. The upcoming CEOs and in-house lawyers are not as brand-oriented as their older colleagues were in the nineties."

New firms in the market

The number of firms within the region has also increased as partners or senior staff from international firms decided to separate or pursue new options following redundancies, office closures, or reorganisations.

Linklaters' closure of its offices in Bratislava, Bucharest, Budapest and Prague in June 2008 gave birth to Kinstellar, a Linklaters spin-off firm, staffed by former Linklaters partners including Jason Mogg, the former Linklaters managing partner for CEE.

The firm continues to hold joint pitches for work with Linklaters, as well as sharing training and secondment schemes. Aided by this magic circle firm, but without the associated overheads, Kinstellar is growing steadily and has already opened new offices in Tukey.

2010 saw five DLA Piper partners, including two joint managing partners, leave the Vienna office to open their own firm.

The same year the closure of the Clifford Chance office in Budapest gave life to Lakatos Köves & Partners, a spin-off firm which incorporated all 29 Hungary-based fee earners.

Economic growth

The growth of local firms and the establishment of new firms imply that the CEE economy still has considerable potential. And the economy is improving. While foreign investment in some countries is low, others have seen a quick recovery from the crisis.

Countries with low manufacturing and labour costs, such as Slovakia and the Czech Republic, continue to attract foreign investment. This is

Legal risks of shale gas exploration and exploitation in Poland

Andrzej Wiercinski
WKB Wiercinski, Kwiecinski, Baehr

Ewa Rutkowska-Subocz
WKB Wiercinski, Kwiecinski, Baehr

The continuous decrease in conventional natural gas resources results in an increased significance of exploration and exploitation of unconventional gas resources, including shale gas. Currently, almost all eyes of the world's gas industry are turned to Poland, which is said to have considerable shale gas deposits. The shale gas deposits are probably trapped within the zone extending from the north-west to south-east part of Poland. Although works connected with deposits identification are at a preliminary stage, they have already attracted great interest in investors, particularly the foreign ones, who possess the necessary knowledge and exploitation technologies. Within the last two years, around 60 concessions for exploration of unconventional natural gas deposits were issued in Poland.

Investors' involvement in the exploration and exploitation of natural gas in Poland is connected, among others, with legal risk assessment.

The first legal risk which needs to be taken into account concerns "safe" transition from the exploration to the exploitation stage. Under the currently binding geological and mining law, an investor interested in obtaining a concession should conclude an agreement on establishing a mining usufruct with the State Treasury (granting the right to use the deposit space owned by the State Treasury) and apply for issuance of a concession (enabling it to pursue the specific activity within this space). Both the mining usufruct and the concession may pertain to the exploration of minerals or, separately, to the exploitation thereof, or to both these stages. If the mining usufruct and concession pertain only to the exploration stage, the problem of "safe" transition from the exploration to the exploitation stage arises for the investor. Currently such transition to the exploitation stage for an investor who previously held mining usufruct agreement and concession for a given deposit is rather unproblematic. However there might be a change in this respect in the near future as a new draft geological and mining law is currently in the legislative pipeline and is said to be adopted soon. The aim of the draft is, among others, to fully implement into the Polish legal order provisions of the so-called Hydrocarbon Directive No. 94/22/WE, which envisages tender procedures for exploration and exploitation of hydrocarbons. Thus, the draft introduces an obligation to carry out a tender procedure preceding the issuance of a concession for exploitation of hydrocarbons. The latest wording of the draft does give some grounds to assume that the tender procedure will not be necessary each time the concession is granted. However the issue is highly controversial and to a certain degree it remains unknown whether the investor who explored the deposit will also be able to obtain the exploitation concession thereto without being exposed to the obligatory tender procedure.

The next legal risk concerns the application of environmental impact assessment procedures existing in the Polish environmental law to the shale gas exploration and exploitation activities. As the law provisions make it completely clear that the environmental impact assessment is required during the exploration stage, which involves the use of explosives in the geological works, the necessity to conduct the environmental impact assessment still remains controversial in practice. The industry emphasises that the explosives used during the exploration phase are of a very low power and are used at a depth of a few kilometres, where they have no impact on the environment in the common meaning. Nevertheless, Polish law provides for no exception for such a situation. The chances that the respective provisions will be changed to adapt to the needs of the shale gas industry seem to be relatively low, as Polish law implemented the European Directive, which is interpreted widely by the European Court of Justice. Due to the requirement of public participation, conducting the environmental impact assessment procedure prior to the exploration phase might cause certain delays.

Water management is another issue for consideration. Under the currently binding Polish law a separate permit for water usage has to be obtained by the entity wishing to explore the deposits. The water permit might not be issued when the water usage could negatively influence the water equilibrium. As the water permit is issued by local authorities, there exists a risk that they will not have sufficient information about the shale gas exploration and exploitation processes, and thus behave very conservatively towards the needs of the shale gas industry. To counteract this tendency, there is a need for proper education of respective authorities.

The last material problem concerns dispersal of competences in the administrative procedure preceding exploration and exploitation operations. Necessary administrative acts are issued by different authorities at various levels. There seems to be a need on the part of the industry for a more co-ordinated procedure in respect to shale gas. This may either mean a concentration of all the competences within one authority or a designation of one authority responsible for co-ordination of the administrative procedures. ■

By Andrzej Wiercinski and Ewa Rutkowska-Subocz at WKB Wiercinski, Kwiecinski, Baehr

Poland has survived the recession particularly well thanks to a strong internal market. Poland was the only EU economy not to fall into recession last year, instead growing by 1.7%.

particularly the case in countries with EU membership, or negotiations towards membership, as local firms have secured relationships with larger EU companies who are looking for local manufacturing possibilities at a low cost.

Other countries have continued to do well despite the recession. Poland, for instance, has survived the recession particularly well thanks to a strong internal market.

Poland was the only EU economy not to fall into recession last year, instead growing by 1.7%, and is expected to recover steadily towards 3% growth in 2011.

"Poland is a country with such enormous potential," says Jane Townsend, Allen & Overy's head of Central Europe.

"This is primarily because of the size of the domestic market. It is similar to the situation in France. The French don't export all that much but they have managed to ride through the recession because their own domestic market is so significant."

This position has meant that Poland wasn't as affected by the drop in FDI in the region.

Russia has recovered quickly from the recession. The country suffered badly in 2009 due to the global crisis but is now witnessing rapid growth due to a recovery in oil and commodity prices. GDP growth increased by 5.2% in the second quarter of this year compared with the same period last year.

This economic growth in the country has also benefited neighbouring countries as new investment floods in. Ukraine is one such example.

"There are a lot of new developments with Russia as a business partner in Ukraine. We have had a large inflow of Russian funds into the country, particularly from state-owned companies." says Michael Kharenko, a partner at Kyiv-based law firm Sayenko Kharenko. "Russian banks are providing loans not only to Ukrainian corporations but also acquiring Ukrainian businesses."

Optimistic outlook

The promising economic situation in these countries is good news for the regional legal market. Being less affected by the recession, large Polish companies continue to carry out complex transactions and as such need the expertise of international firms.

In May this year Dewey & LeBoeuf advised PZU S.A., the largest insurance group in Poland, on its initial public offering on the Warsaw stock exchange. The IPO, valued at over PLN8 billion (US$2.63 billion) is the largest debut in the history of Central and Eastern Europe's capital markets. It is also Europe's largest offering since the end of 2007 and Europe's largest in the insurance sector in the past five years.

"International law firms are still very strong as far as the top-end banking and finance and capital market transactions are concerned," says Andrzej Wiercinski, a senior partner at Wiercinski, Kwiecinski, Baehr.

Russia, too, is once again attracting the attention of international firms. Berwin Leighton Paisner, Clifford Chance, White & Case and Dewey & LeBoeuf have all scaled up their operations within the country over the last year.

The fact that this comes despite rumours about the introduction of new regulations that could hamper the influence of foreign firms in the country shows how significant international firms consider the country.

BLP has shown particularly rapid growth in the tax area. The firm has built up a local tax practice in Moscow that has seen the number of tax lawyers rise from two to 11 over the last year. The first quarter of 2010-11 saw billing to clients up by almost a third compared to the same period last year.

Clifford Chance recently relocated Nicholas Munday, formerly the London head of litigation

Ukraine adopts long-expected PPP law to boost infrastructure development

Svitlana Kheda
Sayenko Kharenko

For more than five years the concept of the public-private partnership (PPP) has been promoted among Ukrainian national and local state officials. However, notwithstanding the endless discussions, roundtables, and workshops organised by various international organisations aimed at briefing the Ukrainian public sector on the international standards of PPP regulation and implementation, many state and local officials still seem to lack a common understanding of the PPP notion and what it entails.

Nevertheless, these efforts, combined with the approaching 2012 UEFA European Football Championship, have resulted in the concept of PPPs, new to Ukraine, becoming popular among the leaders of the major political forces and associated with successful infrastructure development. As a result, a number of draft PPP laws were introduced to the parliament by the Cabinet of Ministers, President and various members of parliament, which indicated that the executive branch had formed its opinion on the need for a special PPP law in Ukraine.

Finally, on 1 July 2010, the Ukrainian Parliament enacted the Law of Ukraine No 2404-VI "On the Public-Private Partnership" (the "PPP Law"), which becomes effective three months after its official publication.

In general, the PPP Law was drafted as a framework law with an idea that additional details would be provided by subsequent legislation and in specific PPP agreements. This resulted in the PPP Law not being in full compliance with the international standards for PPP legislation. For instance, transparency is not included in the main principles of PPP activity stipulated in Article 3 of the PPP Law. The PPP Law also does not contain an anti-corruption clause, and is silent on dispute resolution procedures. Considering that this PPP Law represents a general framework law, it is difficult to predict the level of transparency of the special legislation. Nevertheless, many stakeholders consider the PPP Law as an important document declaring state policy in the PPP area, which could trigger the launch of pilot PPP projects.

It should be emphasised that while the PPP Law does improve upon the existing legislative regulation for PPPs, it does not by itself and in its current state provide an adequate basis for a successful PPP programme. However, it contains many important provisions. For instance, the PPP Law declares, among others, the principles of open participation and non-discrimination, fair risk allocation, and equal treatment of public and private partners (i.e., it generally satisfies the fairness criteria). The PPP Law establishes a general principle of the national treatment of foreign partners (including in the public procurement area) and provides private investors with the option of state guarantees (Article 19 and 18 respectively).

The PPP Law also clearly defines the concept of PPP and its characteristics, elements of infrastructure for which PPP contracts may be concluded, types of PPP contracts, as well as establishing the duration of the PPP projects (from 5 to 50 years). However, the PPP Law is frequently vague on specifics, with the intent that these would be clarified by other laws and regulations. For instance, its provisions on public procurement are in the form of a general declaration.

Based on international experience, one of the key elements of a successful PPP programme is the existence of a specialised PPP unit in a given country. The PPP Law provides for creation of a specialised PPP governmental body at the national level within three months of the PPP Law becoming effective (Article 21, 22, and Section VI, item 3 of the PPP Law).

For the private partners, especially for foreign investors, it is very important that the state itself as a public partner (and not one of its national or local state authorities, or public companies) becomes a party to the PPP contract. Article 1 of the PPP Law answers this concern by clearly providing that the public partner shall be the State of Ukraine, the Autonomous Republic of Crimea, or territorial communities represented by the respective national or local state authorities.

In Ukraine, as in many countries with insufficient legal regulation of PPPs, the legislative gaps can be rectified in individual PPP contracts. At this stage of Ukraine's development, global reforms do not seem to be successful, but step-by-step improvements can be accomplished. Therefore, the narrow (parallel) approach to PPP development, that of launching a couple of pilot PPP projects with a simultaneous development of the applicable legislation on the national level, appears to be the best solution. Regardless of the approach, it is important to create a clear and stable legal environment and to ensure that equal rules apply for all PPP transactions. ■

By Svitlana Kheda at Sayenko Kharenko

"I believe that we have had a 40% increase in finance work and all of it is from Russia. Five years ago we had no work from there."

A partner at a Kyiv-based law firm

Ondrej Peterka, managing partner at Peterka & Partners

and dispute resolution, to Russia in order to develop the firm's cross-border litigation and arbitration practice.

White & Case recently bolstered its M&A and corporate practices in the country by hiring two former Clifford Chance partners, Andrei Dontsov and Maria Oleinik, and four associates. Meanwhile, Linklaters partner John Stansfield was seconded from the Frankfurt office at the end of May. In addition, Dewey & LeBoeuf's Moscow office hired two partners from rival firms in Moscow, in order to boost its banking and real estate practices.

Economic growth from Russia has also led to investment moving into neighbouring countries, such as Ukraine. This has resulted in a wealth of new finance work for Ukrainian law firms.

"It is very significant. I believe that we have had a 40% increase in finance work and all of it is from Russia. Five years ago we had no work from there," says one partner at a Kyiv-based law firm. "We are working on projects with a number of clients, including a number of Russian banks, who we have never worked with before."

Conclusion

In a recent report PriceWaterhouseCoopers said that FDI inflows into Central and Eastern Europe are unlikely to bounce back to previous highs. This is a considerable amount of time and international firms who have stuck around could find it a trying time when other markets have become increasingly attractive.

"I'm not sure they will be able to wait forever because they will be more interested in other markets," says Ondrej Peterka, managing partner at Peterka & Partners.

But for those who do the opportunities could be immense and until then the markets in Russia and Poland will hopefully sustain this presence. Domestic firms, meanwhile, can use the opportunity to expand on their current practices and develop out of the region – something that some firms, such as Peterka & Partners, are already doing. So, while the near-future would still appear unpredictable the CEE still holds potential yet. ■

Maksym Kopeychykov
Ilyashev & Partners

Restructuring of local debts by Ukrainian banks

Starting from autumn 2008, most of the Ukrainian banks had been suffering big problems with liquidity because of a combination of factors, including significant withdrawal of funds from current accounts and deposits by individual and corporate clients and devaluation of the Ukrainian hryvnia, which had substantially lost its value against foreign currency. The banks that had the biggest problems were local retail banks. UAH1.8 billion was withdrawn from deposits and current accounts in one of the largest Ukrainian banks in October 2008 alone. The banks were not able to prevent the withdrawal of funds, due to statutory provisions which require banks to refund deposits to individuals on demand even before the due term. Some banks lost access either to the inter-bank funding markets or international capital markets, further restricting their ability to source funds to operate their businesses.

In autumn 2008, the National Bank of Ukraine granted short-term (mostly one-year) refinancing loans for the total amount of almost UAH37 billion to 88 Ukrainian banks, but even such big sums did not prevent some banks from falling into insolvency.

Loans for the total of billions of hryvnias became due in 2009 and the main efforts of Ukrainian banks were focused rather on restructuring of their foreign and local indebtedness, than on working with bad debts or business development. Thanks to foreign advice it was quite clear to the banks how to restructure their debts before international investors, and how to prolong the loans granted by the National Bank of Ukraine; but banks faced the need to make new agreements with Ukrainian individual and corporate clients, which proved challenging because of a lack of trust in the banking system and a legal vacuum.

The National Bank had taken temporary administration of 15 Ukrainian banks (as of 1 May 2009), and placed a moratorium on them, meaning they did not have to refund deposits for a period of six months.

Nevertheless, the moratorium passed quickly and it was still necessary to restructure debts.

Different banks used different methods to persuade their clients to maintain their deposits, but the main argument was that almost nobody would like to go through three-stage court proceedings against banks, spending a lot of time and/or paying large sums of money to lawyers. Of course, banks also provided some economic motivation, such as partial refunding, crediting deposits with past due interest, higher interest rates and better terms for other banking products.

Some banks tried to agree on partial refunding of deposits by means of transferring property received by banks as security under loan agreements, but few succeeded because of complicated enforcement procedures against mortgaged property and a significant drop of real estate and land prices.

The terms of restructuring were not public and thus, despite most of the banks setting their own internal restructuring programmes, clients may have received very different terms of restructuring. The major legal schemes which had been used to fix restructuring were (i) signing new deposit agreements with increased sums of deposit (provided that it was decreased if there was a partial refunding or increased, if past due interest was also deposited) and fixed terms of refunding (despite it still being prohibited by law to refuse individuals in their request to refund a loan, even if such request is made before the due term), (ii) prolongation of deposit agreements and amending the terms of such agreements in respect of the sum of deposit (provided that it was decreased if there was a partial refunding or increased if past due interest was also deposited), extending maturity dates and increasing interest rates, (iii) novation (or partial novation) of deposit to the current account, which was often used by the banks which had been placed under temporary administration.

Despite restructuring of local debts being quite a new challenge for Ukrainian banks, some of them acted very successfully. Nevertheless, banking legislation in Ukraine still needs to be modified in order to set strict rules for such restructuring. ■

By Maksym Kopeychykov, partner at Ilyashev & Partners

IP rights in the Western Balkans

Vuk Sekulic
Zivko Mijatovic and
Partners, doo

Western Balkans is the region of South-East Europe that is not yet in the EU, and encompasses Albania and the former Yugoslavia minus Slovenia (that is: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia, including Kosovo).

The region is potentially a big market for international companies (its estimated population is more than 24 million people), although its economy is still lagging behind neighboring countries which are EU member states. What is more, due to its geographic position, the region is one of the main transit routes for counterfeit and pirated goods coming in from China, Turkey and other counterfeit capitals to the EU. Illegal goods arrive in the region by land, air and sea (the main ports on the Adriatic Sea are Durrës in Albania, Bar in Montenegro, and Rijeka, Split and Ploce in Croatia).

For that very reason, many international companies have understood the importance of actively prosecuting and litigating their IP rights in the region. But the question many ask is: do the local laws allow for such actions and are they adequately supported by state authorities?

The answer, some exceptions nothwitstanding, is yes. Because the countries in the region aspire to become EU member states, they have all adopted laws which are largely in line with the relevant EU Directives. Many of them have gone to great lengths to create and properly equip bodies to deal with this matter. All countries in the region allow for recordal of IP rights before customs (and, in some countries, before market inspectorates). Customs authorities regularly seize counterfeit goods on borders, and police and market inspectors act accordingly within the territories. The courts have become much more efficient: civil proceedings which would have lasted several years in the past are now being completed within months. In many countries, disputes arising from infringing web domains are being settled by specialised arbitration.

Since the new laws were implemented, the courts have had the opportunity to deal with many different forms of infringement of IP rights, such as dealing with counterfeit, pirated and look-alike goods (export/import, transit, sale, advertising), unauthorised usage of trade marks and/or copyrighted works as part of business names and corporate identities of local companies, as well as infringements on the Internet. As a result, case law has been developed to interpret many provisions of the laws, and the courts are now deciding on many issues as a matter of routine whereas previously these same issues would have raised doubts.

One of many success stories is the Serbian case of Manpower Inc. v Manpower Staffing Services doo in which Zivko Mijatovic & Partners represented the plaintiff. Manpower Inc. from the USA is the holder of trade mark registrations for the word 'manpower' in relation to employment services. Manpower Staffing Services doo ('MSS') was a Belgrade-based employment agency which used the word 'Manpower' as part of its business name, as part of the names of its web domains, and in advertising. It even went as far as to start civil action against Manpower Inc.'s local licensee claiming infringement of its business name. After MSS did not respond to a cease and desist letter, Manpower Inc. started civil action against MSS on grounds of trade mark infringement and unfair competition. Following the grant of interim relief proposed by Manpower Inc., MSS agreed to immediately stop using the word 'Manpower' and entered into negotiations with Manpower Inc. which resulted in a settlement under which it paid compensation to Manpower Inc. in the amount of US$20,900.

The adoption and implementation of the new laws, as well as the proactive approach taken by many rights-holders, significantly raised awareness of IP rights and the need for respect thereof among the general public in the region. Infringers have also become increasingly aware of the possible consequences of their illegal activities and, as a result, they are much more willing to react to cease and desist letters and generally to co-operate to terminate violations.

The successes achieved in the field of IP protection are even greater when one bears in mind that a mere 20 years ago, the concept of a free market economy was unknown to former Yugoslavia and Albania, that armed conflicts raged during the nineties throughout the countries of former Yugoslavia, and that the region is still economically weak. The situation is not yet perfect and problems still exist; for example, the courts in Bosnia have not yet reached the desired level of efficiency, and in Serbia there are problems with the destruction of counterfeit goods. But these problems will certainly be solved in the near future.

What is important is that all international companies recognise the strategic importance of this region for their businesses and do not give up their proactive approach under the current recession. Otherwise, counterfeiters will see their chance to once again turn the region into their safe haven. ■

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Doing business in St Petersburg. Regional specifics.

Over the past two years the Russian economy in general – and that of St Petersburg in particular – has faced a number of serious issues. Financing difficulties and the uncertainty of macro-economic forecasts have led a number of investors to either scrap major projects or opt not to build a business in the northern capital.

However, investors still consider a number of sectors to hold promise, above all the automotive production and construction industries. Major investment projects in these areas started before the crisis. Companies are continuing to implement them, adjusting their strategies to take into account the possibility of protracted stagnation on the market. Significant capex investments are now being made to increase the capacities of production facilities and industrial enterprises built in St Petersburg and Leningrad Region.

As the economic situation changes, so does the strategy of the city's authorities: for example public-private partnerships are now open to both billion-rouble projects and also local projects.

These factors lead us to hope that the pool of investors serious about launching projects in St Petersburg will not contract over the next few years, but will instead increase.

A number of regional legislative acts have been adopted to improve the investment climate in St Petersburg and have already had an impact. The following deserve mention:

- Law No. 59-19 of St Petersburg dated 15.02.10 "On the Establishment of the Price of Land Plots in St Petersburg", which affected primarily property developers.

The law establishes a new way of calculating the privatisation value of land plots. For example, if the purchase price of land in St Petersburg equalled nine times the land tax prior to the law's adoption, after its adoption the price is calculated in a number of cases either as in the past or proceeding from the cadastral value of the corresponding land plot.

- Law No. 29-10 of St Petersburg dated 16.02.09 "On the Rules of Land Use and Construction in St Petersburg". Pursuant to Federal Law No. 137-FZ dated 25.10.01 "On the Entry into Force of the Land Code of the Russian Federation", after 01.01.10 state or municipally owned land plots are only provided for construction if rules for land use and construction have been developed for a corresponding area.

These rules eliminate the need to draft temporary construction rules and serve as the basis for preparing land planning documentation: site design, boundary surveys, and also urban development plans for the land plots.

- As many investors have found it difficult to raise finance for projects and meet implementation deadlines owing to the adverse impact of the economic crisis, a number of measures have been adopted to simplify the investment process. In particular, these changes concerned the procedure for extending investment contracts.

The rules governing investment contracts were in a number of cases simplified by amendments introduced over the past two years to Resolution No. 1592 of the St Petersburg Government dated 21.09.04 "On Approving the Regulations on the Procedure for Issuing Decisions on the Provision of Real Estate Properties for Construction and Reconstruction." If an investor missed work deadline, but duly discharged its obligations, the term of a lease agreement for a land plot granted on investment terms may be extended under the simplified procedure for 15 months based on a decision of the Construction Committee without requiring amendments to the resolution of the St Petersburg Government.

The set of measures implemented to support and develop investments in St Petersburg also include a number of tax breaks:

- If a company invests RUB150 million or more in fixed assets during the calendar year, it is eligible for profit tax and corporate property tax concessions (provided for three years). The size of concessions will depend on the amount of investments.
- Investment "threshold" for concessions is far lower for companies investing in the production of hi-tech products: profit tax is reduced by 4.5% for three years, if a company invests over RUB50 million in the calendar year.
- Companies investing more substantial amounts are eligible for more substantial concessions. If a company invested RUB3 billion over three calendar years, during the first five years it is eligible for a 4.5% cut in profit tax rate and does not pay property tax on the fixed assets booked when calculating investments.

NB: To be eligible for these concessions in St Petersburg, a company does not need to conclude an investment contract with the city authorities. The procedure is declarative: if a company makes the required amount of investments, the concession can be reflected in the tax return.

From 1 January 2011 the concessions mentioned above will be consolidated into one group. A company will be eligible for a 4.5% cut in the rate of profit tax and property tax exemption for five years if it invests above RUB800 million over three calendar years.

- A special technology development economic zone has been set up in St Petersburg. In addition to the concessions stipulated by federal legislation, residents of the zone receive a 4.5% reduction in profit tax payable to the city.
- Confessions for companies investing in real estate: if reconstructing regionally important cultural heritage sites, the actual site is exempted from property tax (the period of exemption depends on the amount of investments). ■

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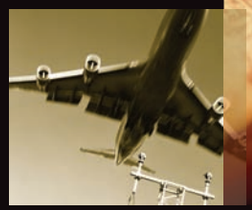


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