



## Presidium of the Supreme Commercial Court of the Russian Federation published a draft of an Information Letter concerning issues related to interest rate swap agreements

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## Presidium of the Supreme Commercial Court of the Russian Federation published a draft of an Information Letter concerning issues related to interest rate swap agreements

*The Draft Informational Letter “On several issues of dispute resolution emerging from interest rate swap agreements”(the “Draft”) of the Presidium of the Supreme Commercial Court of the Russian Federation (the “Court”) was published on the Court’s website on September 17, 2013.*

The practice of commercial courts regarding derivatives in Russia is not very extensive, therefore every case in this sphere draws attention of the investment community.

Clause 1 of the Draft is devoted to mutual obligations of the parties under interest rate swap agreements. The Court clarifies that both final amount of debt and a party becoming an ultimate debtor can be determined at a future date depending on a variable value (e.g., in interest rate swap agreements – depending on a LIBOR interest rate). Also, the Draft does not provide for any restrictions with respect to the parties that participate in such transactions, meaning that such interest rate swap agreements can be executed by any type of parties involved.

Clause 2 stipulates that anticipatory repudiation of a master agreement is possible only, if there are no continuing swap obligations between the parties thereto. At the same time such repudiation is possible only when: (1) the debtor under the master agreement is determined, (2) all debt amounts due under each existing swap are calculated, (3) the total set-off amount is determined based on the provisions of the master agreement and (4) the obligation on payment of the total set-off amount is fully discharged. Anticipatory repudiation of separate swaps is made pursuant to general provisions of Article 450 of the Russian Civil Code. Noteworthy, Clause 2 does not provide for compensation for anticipatory repudiation. It is understood that the parties may elaborate on the terms for such compensation in

the agreement.

Clause 3 allows the parties to include in interest rate swap agreements the terms and provisions contained in the standardised documentation by reference. According to the Draft, amendments to the standardised documentation would have legal effect on the parties only when it is directly provided in the interest rate swap agreement.

Clause 4 provides that financial market professionals shall act in good faith and, prior to entering into an interest rate swap agreement with a lay person, disclose economic and legal information with respect to the derivatives to be used and possible consequences, including the worst-case scenario, of changes in basis assets of such derivatives. In case of failure by a financial market professional to meet the aforementioned obligation, a non-breaching party may demand repudiation of the agreement and recovery of damages in accordance with Article 15 of the Russian Civil Code.

Clause 5 covers a situation where the parties enter into an interest rate swap agreement in order to minimise currency or interest rate risks affecting another existing or future agreement (e.g. loan agreement). In such case, the courts are given a right to satisfy the claims of a party whose interests are affected by continuing existence of an interest rate swap agreement, to repudiate or amend such interest rate swap agreement accordingly if the purpose of its execution is no longer satisfied or if its existence violates the principle of good faith. Based on given examples, this situation may occur when existing or future agreement between the parties of the swap, being an object of risk minimisation, is altered, terminated or never entered into by the parties and the survival of a swap agreement would put one party in a disadvantage and may result in economic losses that do not correspond

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to principles of good faith and reasonableness.

Clause 6 puts provisions of Clause 4 regarding obligations of pre-contractual disclosure of information into legal force and effect with respect to agreements entered after the official publication of the Draft.