

The Law on Amendments to the Civil Code: Much Ado About Nothing?

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On Dec. 14, 2012, the Russian Duma adopted the Law on Amendments to the Civil Code in the second reading. For roughly a year now, the Russian legal community has been abuzz with discussion of the draft new Civil Code amending all four parts of the current Civil Code. The law approved by the Duma last week, however, amends not the four parts of the RF Civil Code, but merely the first four chapters of part one. It's really incredible to consider, and a little humorous to recall the time and money spent drafting and discussing a radically new foundation for Russian civil law. Conferences, journals, study groups — it seemed that Russia intended to radically recast its most fundamental civil law. Indeed, the prevalent view seemed to be that without a new Civil Code, Russia could not succeed in building a modern, innovative and diversified economy. At the end, after all the excitement and publicity, only four chapters of the Civil Code were amended, and the new Chapter 4, Legal Entities, for example, only adds a single new legal entity, the Farm (peasant) enterprise. The new Civil Code has turned out to be "Much ado about nothing," or as one of my colleagues put it: "The elephant gave birth to a mouse."

As a foreign lawyer living in Russia for over a decade, I was never really enthusiastic about the idea of a new Civil Code. Throwing out the current Civil Code whole cloth would have implied that it was inadequate and that Russia had made no real progress in putting in place the building blocks of civil law. That implication is, thankfully, absolutely not the case. In fact, Russia has made incredible progress in drafting a coherent set of laws and regulations in the short period of time since the collapse of the Soviet system. There are problems in the Russian legal system, just as in any legal system, but problems can be worked out over time through amendments and court practice. As a general matter, incremental improvements in the law over time, and even more importantly, the fair and impartial implementation and enforcement of the law are what is needed, and not a radical overhaul of 20 years of progressive development.

The proposed overhaul of the Civil Code took place in the context of a perceived competition between Russian law and foreign law. Russian courts and scholars and even the mass media concluded that too many transactions were governed by foreign law. Thus, choice of law and forum had to be strictly limited, while simultaneously making Russian law more attractive and competitive by adopting a new Civil Code, incorporating elements of English law in particular. However, the real reason that English or Swiss law may be more attractive to Russian as well as foreign investors contemplating investments in Russia is the lack of an impartial enforcement mechanism. Trying to cure this problem by limiting the right to choose the governing law of a contract or to prevent arbitration even in Russia of corporate disputes will lead to a deterioration of the investment climate. In this sense, the introduction of certain English law concepts would have been a positive development to introduce certain English law concepts into the Civil Code. But the real problem is on the implementation and enforcement side, so even if the Civil Code had been completely replaced, it would hardly have led to greater acceptance of Russian law in international transactions.

The lesson for the further development of Russian law is two-fold: firstly, less may in many cases be more. Big projects are harder to realize and implement, and as a result, it is often the case that nothing happens. Secondly, Russia should develop its legislation in harmony with international law and in particular with internationally accepted concepts of private international law or choice of law, and should resist attempts to legislate the choice of domestic Russian law. But even more important than the further reform of Russian civil law is the fair and impartial enforcement of the current law. Moreover, strong, independent and corruption-free judicial review will play a major role in the development of the law itself, even in the context of Russia's continental (as opposed to a precedent-based) legal system.

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