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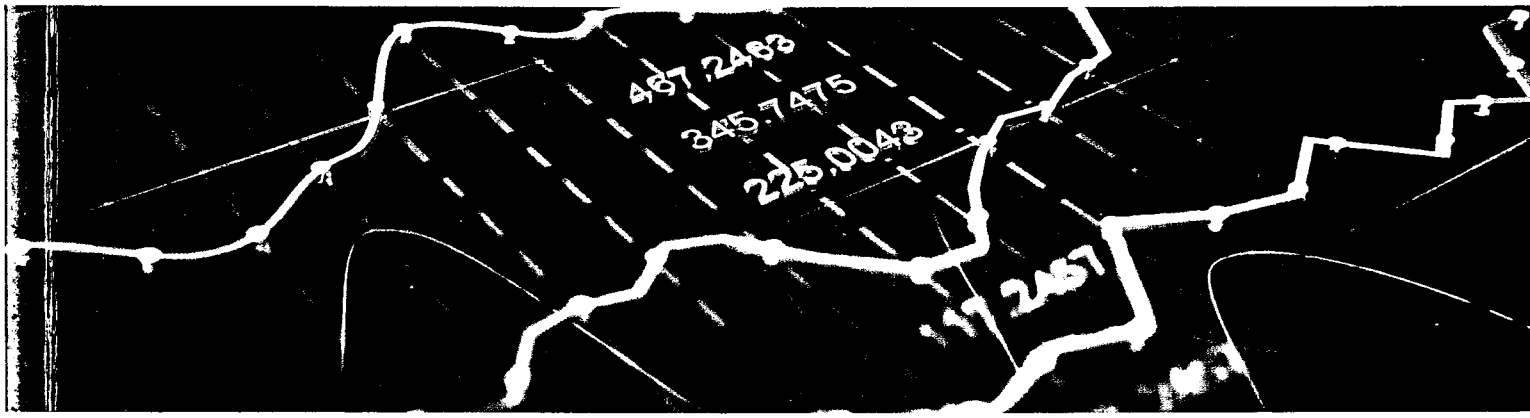

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Recent Reforms of Financial Regulation in Russia: legal aspects

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According to the OECD Policy Framework for Effective and Efficient Financial Regulation, financial regulation is a financial sector policy instrument, which "can set out, in clear, pre-determined fashion, certain outcomes for participants in the financial system" or "can seek to influence the behavior and action of participants through compulsion, the alignment of risks and incentives, and the establishment of governmental expectations"[59]. The Russian Federation, while being perfectly good in influencing the behavior of market participants, both local and, especially, foreign, has not always been able (or willing) to set the definite outcomes for their actions. In early 1990s, when the Soviet centralised financial system was abolished, the first laws to govern Russian financial market were passed. At first, not all the spheres in financial market were regulated: there were times when financial market participants were transacting without any laws at all, resulting in massive frauds and public concern. The tragic outcomes of voucher privatization in Russia hampered greatly the public opinion on the vices and virtues of the financial market[60]. *Laisser-faire* was, and still is not, a proper word for the Government's policy in the Russian financial market.

59. OECD. Policy framework for effective and efficient financial regulation, 2010, p. 20.

The 2008 financial crisis refocused the Government's policy on the importance of sound financial market regulation. Following the shaping global political trend[61], the Russian Government decided to redesign the regulation of financial markets. Amongst numerous governmental initiatives emerged during the following years[62] one is the most notable: "Strategy of the Development of the Financial Market of the Russian Federation 2008" (hereinafter – Strategy)[63].

> "In 2013, the Strategy gained momentum in the creation of the "mega-regulator", an agency responsible for the whole financial market."

60. *See, e.g.,* M. Boychko, A. Shleifer, R.W. Vishny, "Privatizing Russia", (1993) 2, *Brookings Papers on Economic Activity*, 139-192; H. Appel, "Voucher privatization in Russia: structural reforms and mass response in the second period of reform", (1997) 49 (N 8) *European Studies*, 1433-1449. According to the official data, by 1995 only 4 % of the population was ready to invest in securities. *See,* "Concept of the Development of the Securities Market in the Russian Federation" adopted by the Order of the President of the Russian Federation N 1008 of 1 July 1996.
61. *See, e.g.,* S. Gadinis, "From independence to politics in financial regulation", *California Law Review*, 2013.
62. *See, e.g.,* "Action plan aimed at recovery of the situation in the financial sector and separate sectors of economy" adopted by the Decree of the Government of the Russian Federation 2008 N 4863-p of 6 November; "Program of counter-crisis measures of the Government of the Russian Federation for 2009" adopted by the Government Meeting, Protocol N 11 of 9 April 2009; "Main measures of the Government of the Russian Federation and the Central Bank for the recovery of the Russian Economy in 2009" (appendix to the "Program of counter-crisis measures of the Government of the Russian Federation for 2009"); "Action plan of realization of the Program of counter-crisis measures of the Government of the Russian Federation for 2009" approved by the Decree of the Government of the Russian Federation N 2802-p of 19 June 2009; Federal law of the Russian Federation "On the report of the Government of the Russian Federation and information of the Central Bank on realization of measures on support of the financial market, banking system, labour market, sectors of economy of the Russian Federation, social support of the population and other measures of social policy" N 102-FZ of 3 June 2009; "Main directions of counter-crisis actions of the Government of the Russian Federation for 2010" adopted by the Government Meeting, Protocol N 42 of 30 December 2009.

The Strategy was aimed to create an international financial centre at the heart of the Russian Federation[64]. During 2008-2012 the Government managed to keep up with the adopted schedule. Three main authorities responsible for the implementation of the Strategy – the Federal Service for Securities Market (FSSM), the Russian Central Bank (Central Bank) and the Ministry of Economic Development – mutually developed and introduced into the Russian Parliament different laws modernising Russian financial regulation. Within the said period the laws on clearing and netting[65], on national payment system[66], on central depositary[67], and others[68] were passed, as well as many other rules and regulations of the relevant governmental agencies intended to specify these laws.

In 2013, the Strategy gained momentum in the creation of the "mega-regulator", an agency responsible for the whole financial market. This revolutionary shift was coupled with the changes in securities laws, the Russian Civil Code reform, and heated discussions on the merger of two higher Russian courts.

I. Creation of the "mega-regulator"

The idea of single financial regulator is not new to the international community. The world's general tendency is to create so-called "mega-regulators"[69] or "singe regulators"[70] responsible for the whole financial market. Such agencies were established in UK (Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) of the Bank of England[71]), Switzerland (Financial Market Supervisory Authority), Singapore (Singapore Monetary Authority), Germany (Federal Financial Supervisory Authority) and others. In some countries, however, *e.g.*, Canada, China, US there is still no "mega-regulator".

Noteworthy, the first body to mention the need for single supervising body in Russian financial market

63. "Strategy of the Development of Financial Market of the Russian Federation for the period until 2020" adopted by the Decree of the Government of the Russian Federation N 2043-p of 29 December 2008. The Strategy was preceded by a mid-term program for the period of 2006-2008 initiated by the Federal Service for Securities Market which aimed to "modernise institutes and instruments of the financial market in growing globalization of the world financial system, growth of internationalization of the securities markets, spreading of cross-border investment transactions and strengthening of competition amongst the world's biggest financial centres". As a result of the said program, *inter alia*, derivative transactions became enforceable (Art. 1062 of the Civil Code of the Russian Federation, as amended), and the term "qualified investor" (similar to US law term "sophisticated investor") was introduced into the Russian law.
64. The strategy was extensively analysed and commented by the World Bank. *See*, "The World Bank. Russian Federation. Analysis and Diagnosis of the Financial, Regulatory and Industrial Policies Required for Becoming an International Financial Centre", 2012. It should be noted, that Russia is not the only country endeavouring to modernize its financial market. *See, e.g.*, R. BOLLEN, "Recent developments with banking services in developing countries", (2009) 24:10, *Journal of International Banking Law and Regulation*, 509-524.
65. Federal law of the Russian Federation "On clearing and clearing activity" N 7-FZ of 7 February 2011. The law sets forth the foundation for clearing and its supervision within the territory of the Russian Federation. For the role and importance of clearing houses in financial markets, especially in derivatives market, *see, e.g.*, Y. YADAV, "The problematic case of clearing houses in complex markets", (2013) *Georgetown Law Journal*.
66. Federal law of the Russian Federation "On national payment system" N 161-FZ of 27 June 2011. The law is mainly aimed to create favourable conditions for the development of local electronic payment instruments. *See, e.g.*, A. BARMIN, V. BRYXA, A. SHISHLOV, "Russia and its new regulated e-payment structure", (2011) *E-finance & Payments Law & Policy*. For the role of central clearing counterparties and their contribution in the regulation of financial markets *see, e.g.*, K.N. JOHNSON, "Governing financial markets: regulating conflicts", (2013) *Washington Law Review*.
67. Federal law of the Russian Federation "On central depositary" N 414-FZ of 7 December 2011 (hereinafter – the Law on Central Depositary). The Law on Central Depositary does not establish a single, all-Russian depositary, as it may seem from the name of the law: it sets forth the rules for obtaining the status of a central depositary in the Russian Federation. The law established the foundations for turnover of intermediated securities (for the concept of intermediated securities *refer to, e.g.*, L. THEVENOZ, "Intermediated Securities, Legal Risk, and the International Harmonisation of Commercial Law", (2007)). Starting from 2012 foreign depositaries were granted access to the Russian securities market with the adoption of certain amendments to the Law on Central Depositary. At the moment 75 foreign depositaries, clearing houses and foreign exchanges were granted access to the Russian market (*See*, Order of the Federal Service on Securities Market "On approval of the List of foreign organizations, for which a central depositary opens depot accounts of a foreign nominal holder" N 12-65/pz-n of 27 July 2012). À central depository also acts as a tax agent for dividend and interest payments (previously it was the issuer of securities who was responsible to withhold tax payments).
68. *E.g.*, at the end of 2012 a huge law was passed aimed, amongst others, to simplify the procedures for securities' issuance for those companies which shares are already listed on stock-exchange, and specified the rules for payment of dividends and interests by a central depositary to foreign investors (*See*, Federal law "On amendment of certain legislative acts of the Russian Federation and on cancellation of certain provisions of legislative acts of the Russian Federation" of 29 December 2012).
69. "Handbook of International Banking", (2003) 10.
70. *See, e.g.*, E. FERRAN, "Examining the United Kingdom's experience in adopting the single financial regulation model", (2003) *Brooklyn Journal of International Law*.

was a financial consultant employed by the FSSM in 1999[72]. Nevertheless, it was only in 2008, after the adoption of the Strategy, when the idea of mega-regulator received the Government's support. The mega-regulator was purportedly to be established on the base of the Ministry of Finance, the FSSM or the Russian Central Bank[73] (hereinafter – RCB). Notwithstanding the lengthy discussions, starting from September 2013 the RCB became a supervisor of the whole financial market in Russia[74]. The RCB is now responsible for banking, insurance and securities market sector, and has broad authorities for supervision in the securities market, which includes, *inter alia*:

- surveillance of non-credit financial institutions (including insurance, clearing and micro-financial organizations[75], non-governmental pension funds, open-end funds, etc.), securities issuers, joint-stock companies, rating agencies);
- protection of the rights and lawful interests of the shareholders and investors in the financial market, insured persons and beneficiaries as well as investors and participants in non-state pension schemes.

Additionally, the RCB is now vested with the authority to cooperate with the foreign regulators on various matters[76]. Such cooperation may be made available pursuant to international treaty between the Russian Federation and the relevant foreign state, a bilateral agreement between the RCB and a foreign financial regulator, and multilateral memorandum of understanding on consultations and cooperation and exchange of information with an International Organisation of Securities Commissions. However, the RCB still shares the insurance market with the Government: mandatory and state insurance will remain in exclusive domain of the Government, while commercial insurance will be supervised by the RCB.

> "Now the RCC distinguishes two types of securities: documentary and non-documentary securities"

II. Reform of the Russian Civil Code: securities

Following the adoption of the Strategy, in 2009 the President of the Russian Federation came up with the concept of a reform of the Russian civil legislation. On 7 December 2009 the President's Council on codification and improving civil legislation adopted "Concept of the development of civil legislation of the Russian Federation" (hereinafter – the Concept)[77]. Starting from 1 October 2013 the Russian Civil Code (hereinafter – the RCC) was enlarged by a new chapter subtitled "Securities"[78]. Now the RCC distinguishes two types of securities: documentary and non-documentary securities[79]. The RCC was amended to include the rules on creation, discharge (including pledge), transfer, and enforcement of rights under securities, and also on relations between the issuer, the holder and the securities' registrar.

71. Previously the body responsible for financial regulation in the United Kingdom was the Financial Services Authority, however, starting from 1 April 2013 after the adoption of The Financial Services Act 2012, the functions of this body were transferred to the FCA and the PRA. The FCA regulates the financial services industry in the UK. Their aim is to protect consumers, ensure the industry remains stable and promote healthy competition between financial services providers. The PRA is a part of the Bank of England and responsible for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms. It sets standards and supervises financial institutions at the level of the individual firm.
72. Y. MIRKIN, "All the power in one hand", (2000) 14 *Securities Market Journal.*
73. K. PYLOV, "Financial mega-regulator in Russia: the final decision is ahead", (2013) 56 *PROGRES Newsletter.*
74. Federal law "On introduction of changes in certain legislative acts of the Russian Federation in connection with the transfer to the Central Bank of the Russian Federation of the powers on regulation, control and supervision in the sphere of financial markets" (Law) N 251-FZ of 23 June 2013.
75. Although any professional activity in the Russian financial market is licensed activity, micro-financial organisations enjoy simple registration procedures. Micro-financial organizations are legal entities entitled to grant loans not exceeding 1 000 000 RUB (approximately 23.000 EUR), they are not, however, entitled to take deposits. Micro-financial organizations must be registered with the Central Bank. *See,* Federal law of the Russian Federation "On micro-financial activities and micro-financial organisations" N 151-FZ of 2 July 2010.
76. Article 51.1 of Federal law "On Central Bank of the Russian Federation (Bank of Russia)", as amended.
77. The concept is mainly the summary of the President's council work on identifying the flaws of the RCC based on the views of Russian legal practitioners, governmental authorities, development of the court and business practice. The concept was reflected in the draft law on amendment of the RCC which was introduced into the Russian Parliament at the end of 2012. The law was so huge that the Parliament decided to split it into separate blocks and pass the blocks gradually. The law contains a set of amendments on general concepts of civil legislation, legal persons, civil law objects, transactions, limitation periods, property, security of obligations, different types of contracts, private international law, intellectual property and some others.

Additionally, the law now contains special rules on *bona fides* holders of documentary securities (Art. 1471 of the RCC). Firstly, if a documentary security was unlawfully transferred to a third party, the previous holder (creditor) of such security may enforce its rights using an *actio in rem*. Secondly, if a new holder of the documentary security is a *bona fides* holder, the creditor may not demand from the latter the security back, if (i) such security is a "bearer security" – irrespective of what right it confirms, and (ii) if it is an "order security" (*e.g.,* bills of exchange) or "registered security" (registered securities are not only those registered in special registrar, but also those, the holder thereof obtained the security by the way of cession) – if such securities confirm monetary right. Thirdly, a *bona fides* holder may also be required to transfer the security back to the initial creditor as well as all the sums obtained under the security only from the moment when he knew or should have known (*e.g.*, by way of a court notice) of the fact that the security was transferred unlawfully. However, if the new holder is not a *bona fides* holder, *i.e.* if he initially knew of the unlawfulness of the transfer, he is also liable for the damages incurred by the initial creditor. Generally, the adoption of a new chapter of the RCC on securities is a good sign for securities' turnover. However, the practice on application and interpretation of the new provisions is yet to come.

78. This chapter was preceded by discourse in Russian academic circles. *See, e.g.*, D.I. STEPANOV, "On the theory of securities in Russia and on the theory of notions in general. Reflection on importance of dogmatic studies", (2010) 10:4, *Civil Law Review*, 58-96; see *also*, V.A. BELOV, "Modern state and perspectives of development of civil law theory of securities", (2010) 10:4, *Civil Law Review*, 22-57. According to the Concept, this chapter seeks to consolidate the rules contained in different laws and to formulate a core part of the rules on securities transactions.

79. According to paragraph one of Art 142.1 of the RCC "documentary securities are the documents complying with the legal requirements and certifying contractual and other rights, exercise or transfer of which are possible only by presentation of such documents". According to paragraph two of Art. 142.1 "non-documentary securities are contractual and other rights contained in the decision on issuance or any other act of the person issued the securities in accordance with the requirements of law and exercise and execution of which are possible only in compliance with the rules on their recording". The reason for distinction between two types of securities is a special regime for establishment, transfer, pledge, termination and protection of rights different for each type of securities. Additionally, the securities may only be those, which are expressly indicated in the law as such. The RCC identifies such types of securities as share, bill of exchange, mortgage deed, a share in an open-end investment fund, bill of lading, bond, cheque.

III. Strengthening protection of bondholder rights

In line with the amendments to the RCC, the Parliament passed another law intended to strengthen the rights of bondholders, and to introduce some generally accepted practice on turnover of bonds. Thus, the Federal law "On implementation of changes into the Federal Law "On securities market" and separate legislative acts of the Russian Federation" N 210-FZ of 23 July 2013 (hereinafter – the Law) introduced certain changes into the Law on securities market[80] related to protection of bondholders' rights, including the rules on: bondholders' meetings (BM); bondholders' representative (trustee)[81]; bonds redemption and acceleration[82]. The rules will come into force from 1 January 2014. The BMs are conducted at the issuer's expense and are similar to that of shareholders[83]. Only the relevant depository or registrar may conduct the BM. The specific rules for conduct of BM will be additionally established by the Central Bank. A BM may be convened by (i) the issuer, (ii) the trustee, or (iii) a bondholder(s) holding 10 % of the issued bonds. The exclusive competence of BM is established by the Law on securities market. The BM has the following authorities:

80. Federal law of the Russian Federation "On securities market" N 39-FZ of 22 April 1996 (hereinafter – the Law on securities market).

81. The term "trustee" is not used in the Law and is introduced herein for convenience only. However, it appears that the "bondholders' representatives" are similar to "trustees" in a common law sense for two reasons. Firstly, a trustee is responsible for opening and managing a separate account opened for the benefit of the bondholders, which is immune from private creditors of the trustee (Art. 29.3 of the Law on securities market (as amended by the Law)). Secondly, the trustee has certain fiduciary duties and authorities including the right to sue on behalf of bondholders (Art. $ 29.1 (9) and (11) of the Law on securities market (as amended by the Law).

82. In common law practice these rules are referred to as "collective action clauses" and are usually included in the prospectus. *See, e.g.,* M. GUGIATTI, A. RICHARDS, "The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers", (2004) *Georgetown Journal of International Law.*

83. This rule was criticized by Russian practitioners. It was said that it overtly creates a conflict of interests where a trustee is paid by the issuer to act in a third party's interests – bondholders. *See, e.g.,* A.S. SELIVANOVSKIY, M.E. SELIVANOVSKAYA, "General meeting and representation of bondholders: in whose interest", (2011) 10, *Zakon*. In common law jurisdiction, however, it is widely accepted that the issuer covenants directly with the bondholders in the bonds and gives the trustee a parallel payment covenant. *See, e.g.,* P.R. WOOD, *Law and Practice of International Finance*, London, Sweet & Maxwell (2008), 184.

- to give consent to amend the prospectus, except where such right is given to trustee in accordance with point 5 below;
- to waive bondholders' rights (i) to demand early repayment, (ii) to enforce security (in secured bond issuance);
- to waive bondholders' rights to apply to a court;
- to give consent to the termination (set-off) of the obligations under the issued bonds;
- to transfer the right referred in point 1 above to the trustee;
- to appoint a trustee.

The decisions of the BM are binding upon all the bondholders. Certain types of bondholders (*e.g.*, the issuer which is a bondholder, the bondholder affiliated with the issuer, persons which are security-providers (in a secured bond issuance)) are barred from voting at BM. The voting requirements are as follows: simple majority is required for the matter in point 6 above; three fourth – points 1, 2, 4, 5 above; nine tenth – point 3 above.

> "The Law reflects an overall tendency to keep up with the internationally accepted practice"

The issuer is entitled (and in certain cases is obliged)[84] to appoint a trustee. However, bondholders may at any time at their own discretion reappoint another trustee. The list of the trustees will be maintained by the CBR. There are certain requirements, which the trustee must meet. Firstly, the trustee must be either: (i) broker, dealer, depositary, manager, managing company of the joint-stock investment funds, open-end funds and non-governmental pension funds, credit institution; or (ii) other legal entity established under the laws of the Russian Federation and existing not less than 3 years. Secondly, the trustee must not be affiliated with an issuer. Thirdly, the trustee must act reasonably and in good faith. The trustee acts on the basis of (i) the decision on bonds issuance and (ii) the agreement between the trustee and the issuer. The Law contains a detailed list on the rights and obligations of the trustee[85].

The Law introduces certain conditions for bonds redemption and acceleration. The issuer may, and in cases provided for in the prospectus, is obliged to redeem the bonds. The redemption must be made equally, and the bondholders must present their claims within the period of not less than five days. The prospectus may stipulate that either the issuer or the bondholders may accelerate the bonds. However, where there is a *material breach* on the part of the issuer, the bondholders have a statutory right to demand early repayment. According to Art. 71.1(5) of the Law on securities market (as amended), the following is regarded as *material breach* on the part of the issuer:

- non-payment of interest for more than ten working days (the lesser period may be set forth in the terms of the bonds (notes));
- non-payment of a part of the nominal value of the bonds for more than ten working days (the lesser period may be set forth in the terms of the bonds (notes)) – where the payment of nominal value is to be made in parts;
- failure to redeem bonds for more than ten working days (the lesser period may be set forth in the terms of the bonds (notes)) – where such redemption is set forth in terms of the bonds;
- any security provided under the terms of the bonds (notes) worsens or ceases to exist.

The issuer must make repayments on bonds within seven days after the demand. Although it took almost four years to pass the Law[86], it marks a step forward in Russian financial market regulation. The Law reflects an overall tendency to keep up with the internationally accepted practice, although in a peculiar fashion – standing somewhere between the civil law and common law traditions.

84. According to Article 29.1 (2) of the Law on securities market (as amended by the Law) starting from 1 June 2016 the appointment of bondholders' representative will be mandatory for the issuer if (a) the bonds are issued by (i) an open subscription or (ii) a closed subscription amongst more than 500 persons (excluding qualified (sophisticated) investors); (b) the bonds are listed on a stock exchange (excluding bonds issued to qualified (sophisticated) investors).

85. In general, the trustee acts in the interests and on behalf of the bondholders (monitors the performance of the issuer's obligations, protects the bondholder rights) and represents the bondholders in relations with the third parties (the issuer, governmental authorities, courts, etc.). The trustee is also responsible for handling a special account on behalf of the bondholders whereto the issuer transfers the bond payments as well as trustee's remuneration.

86. The Law was firstly introduced to the Russian Parliament in 2009.

IV. Merger of Higher Courts

One of the fundamental reforms on the constitutional level, which, although not being strictly in line with the reforms in Russian financial market, but due to its high importance cannot be omitted herein, is the merger of two Russian higher courts: the Supreme Court of the Russian Federation (considering cases on civil matters) and the Supreme Arbitrazh Court of the Russian Federation (considering cases on commercial matters)[87]. The new united court, the Supreme Court of the Russian Federation, will be responsible for two branches of civil procedure and for formulation of common judicial practice. The merger of two higher courts will help not only to eliminate discrepancies in current court practice, but also to avoid future uncertainties in the shaping of commercial market regulation.

87. *See,* Draft Federal law "On the amendment to the Constitution of the Russian Federation on the Supreme Court of the Russian Federation and Office of Public Prosecutor of the Russian Federation" N 352924-6. On the issues of Russian court system *see, e.g.,* E. KORYAKINA, "Investors or foreign contracting parties and the Russian judicial system", (2004) 5 *International Business Law Journal*, 637-649; N.F. O'DONNELL, K.Y. RATNIKOV, "Dispute Resolution in the Commercial Law Tribunals of the Russian Federation: Law and Practice", (1997) *North Carolina Journal of International Law and Commercial Regulation*; K. HALVERSON, "Resolving Economic Disputes in Russia's Market Economy", (1996) *Michigan Journal of International Law.*

THE NEW ARGENTINE CAPITAL MARKET'S LEGAL REGIME

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Last November 29th, 2012 the Capital Markets Law 26.831 ("CML") was passed in Argentina which modified the public offering regime set forth by the former Law No. 17, 811 ("POL").

The CML was the first part of a group of several new rules, that would be completed almost ten months later after it has been passed, with the issuance of Decree 1023/13 on July 29th, 2013 and the new National Securities Commission' s regulations ("Ordered New Rules 2013"), recently issued as of September 5th, 2013. All these new rules (together, the "New Rules") came to complete the new capital market legal scheme for our market and finally came into force.

Although most of the amendments confirmed/ratified some previous rules in force at the time of CML was passed, and from this point of view there were no big changes nor novelties in terms of regulation, the CML introduced the deepest reform on domestic market structure in the last thirty years. It was literally the end of the self-regulation set forth in POL, that has been ruled the argentine market for the last three decades. The CML sought to govern not only the capital market players but also, the publicly offered securities and subject to the National Securities Commission, known as Comision Nacional de Valores ("CNV") the regulation and monitoring of all them.

The CML changed the old structure and organization of capital markets in Argentina and as it was commented before, abolished/terminated with the idea of self regulation, one of the most significant exchanges' achievements under the former regulation. This new legal perspective provoked several reactions, mostly critical, that continue at the time of this article, specially from those sectors affected by the new requirements, like agents, that threat to promote judiciary actions specially since CNV regulation was issued.

I. About the new legal scheme introduced by the CML

A. The Principles and Goals[88]

One of the main ways to appreciate the philosophy, the spirit and the concept of a new regulation, is to explore, deeply, into its principles and goals. The CML introduced a renewed list of principles and goals, mainly focused on small investors protection and prevention of market abuses, promotion of a wider participation in the markets (*including union associations, professional organizations, etc.*), the fostering of electronic integration and federalization of our domestic market, and protection of consumer´s rights and a bigger access to the market for SMBs companies. Those principles and goals, mostly in accordance with