



LEGAL UPDATE

Survival guidelines for Transaction Practitioners

ISSUE #4: CONVERTIBLE LOANS: KEY ISSUES AND PRACTICAL ADVICE ON STRUCTURING

Introduction

The convertible loan structure as a means of financing and subsequent participation in the equity capital of venture capital and other companies is commonplace in various jurisdictions. Until recently, there was no direct regulation of such instrument in Russia, which is why convertible loans were structured either under foreign law or under Russian law using other complex (and often cumbersome) legal structures. Russian legislation regulating convertible loans, came into force on 13 July 2021¹ and was intended to simplify the conclusion of investment transactions. Over the more than six months that have passed since then, a number of practical issues have arisen in the course of implementing convertible loan model under the new law. In this overview, we look into some of these issues and provide guidance as to how to address them.

The key steps in structuring a convertible loan:

- i. the lender applies for an increase of the borrower's charter capital by way of an additional capital contribution (if the lender is not a participant (in Russian – *"uchastnik"*) in the borrower's charter capital) or requests to make a contribution into the borrower's charter capital and thus become a participant of the borrower (if the lender is not a borrower's participant²);
- ii. the general meeting of participants of the borrower by way of a unanimous resolution provides consent to the entry into a convertible loan agreement ("**CLA**").

¹ Federal Law No. 354-FZ "On Making Amendments to Certain Legislative Acts of the Russian Federation" of 2 July 2021.

² Unless stated otherwise, "participant" hereinafter means either a shareholder in a non-public joint stock company or a participant in a limited liability company.

- iii. a CLA is entered into between the lender and the borrower which is a limited liability company ("LLC")³ or a non-public joint stock company ("NPJSC");⁴
- iv. a CLA is entered into in the notarial form (for an LLC) or in the simple written form (for an NPJSC);
- v. in the case of an NPJSC, an additional share issue is registered, and the shares are held in the NPJSC's issuer account during the period between the registration of the share issue and the placement of the shares;
- vi. information on an executed CLA is entered into the Unified State Register of Legal Entities ("USRLE") by application of the notary/the borrower's registrar;
- vii. the loan conversion date or event ("**Conversion Event**") occurs;
- viii. the lender serves a request to the notary/the borrower's registrar on an increase of the borrower's charter capital/placement of shares ("**Conversion Request**");
- ix. the notary/the borrower's registrar notifies the borrower of the lender's Conversion Request; and
- x. the charter capital is increased in favour of the lender/shares are placed to the lender, and the necessary amendments (if the borrower does not object) are officially registered or the dispute between the lender and the borrower is resolved by an arbitrazh (commercial) court (if the borrower does object) ("**Conversion**").

3 General comment: Russian law provides for several types of legal forms of legal entities, of which the most commonly used are limited liability companies (LLCs) and joint-stock companies (JSCs). In many ways they are similar, however there are some differences. The charter capital of an LLC is divided into participation interests (in Russian – "doli uchastiya"), the rights to which are registered in the Russian companies register – the Unified State Register of Legal Entities. The participations interests can be disposed of only with the help of a notary, who certifies each contract under which the participation interests are transferred from one person to another, and helps in carrying out other operations in relation to participation interests. As for a JSC, its charter capital is divided into shares, the rights to which are registered with a registrar or a depository (custodian). Shares of a JSC shall be transferred in accordance with the rules adopted by the relevant registrar or depository. Therefore, whether a borrower is an LLC or a JSC effects the procedures of the execution a CLA and the conversion thereunder.

4 Legal entities of other legal forms, including public joint stock companies, may not act as borrowers. Certain categories of LLCs and NPJSCs also cannot act as borrowers under a convertible loan (eg credit organisations, non-credit financial organisations, companies of strategic importance for national defence and state security) - see paragraph 2 of part 1 of Article 19.1 of Federal Law No. 14-FZ "On Limited Liability Companies" of 8 February 1998 (as amended) ("LLC Law"), paragraph 2 of part 1 of Article 32.3 of Federal Law No. 208-FZ "On Joint Stock Companies" of 26 December 1995 (as amended) ("JSC Law").

1. How to obtain regulatory consents for the Conversion?

Filing for regulatory consents in relation to the convertible loan, in particular the approval by the Government Commission for Control over Foreign Investment in the Russian Federation ("**Government Commission**") and/or the Federal Antimonopoly Service of the Russian Federation ("**FAS**") ("**Regulatory Approvals**"), requires close attention when structuring the convertible loan.

This is because the Conversion Request may be made *no later than three months* after the date of the occurrence of the Conversion Event,⁵ while the Regulatory Approvals often (i) have a limited period of validity;⁶ and (ii) must be obtained expressly for the transfer of participation interests⁷ (in respect of a convertible loan, for the Conversion) rather than for the conclusion of binding transaction documents.⁸

For instance, it may not always be possible to obtain a Regulatory Approval from the FAS within three months, taking into account the time needed to prepare the package of documents to be submitted. Furthermore, in our experience it is unfeasible to obtain the Regulatory Approval from the Government Commission in less than three months. It is therefore necessary to start collecting the documents required for filing for Regulatory Approvals well in advance of the occurrence of the Conversion Event.

5 Part 6 of Article 19.1 of the LLC Law; part 3 of Article 32.3 of the JSC Law.

6 For the Regulatory Approval of the FAS under Federal Law No. 135-FZ "On the Protection of Competition" of 26 July 2006 (as amended) ("Competition Law"), such period is equal to one year (part 8 of Article 33 of the Competition Law). The validity period of the Regulatory Approval of the Government Commission under Federal Law No. 57-FZ "On the Procedures for Foreign Investments in the Business Entities of Strategic Importance for National Defence and State Security" of 29 April 2008 (as amended) ("Foreign Investments Law") is determined by the Government Commission ad hoc, based on the applicant's proposal (part 2 of Article 11 of the Foreign Investments Law).

7 Unless stated otherwise, "participation interests" hereinafter means either participation interests in the borrower's charter capital or the borrower's shares.

8 See, eg, part 16 of Article 4, Articles 27 and 28 of the Competition Law, paragraph 3 of part 1 of Article 3 of the Foreign Investments Law.

However, it is not always possible to predict the date of occurrence of a Conversion Event. In this case, we recommend including a provision in a CLA to the effect that a Conversion Event is not only a commercial Conversion Event agreed on by the parties, but also the receipt of the appropriate Regulatory Approval, or a confirmation that such Regulatory Approval is not required, from an independent third party or the relevant government authority.

2. Is “automatic” Conversion possible?

One of the main goals of regulating the convertible loan structure is to allow Conversion to take place “automatically”, ie without the lender going to court to compel the borrower to carry out the Conversion.

The statutory model for a convertible loan provides that the borrower has the right to “object” to the Conversion Request.⁹ If the borrower so objects, a notary or registrar may not carry out the Conversion and the dispute will have to be resolved in court.

There is no statutory requirement for the borrower’s objection to the Conversion Request to be reasonable and/or grounded. Therefore, any statement of objection by the borrower against the Conversion Request may prevent the Conversion.

We therefore recommend that a CLA should include a provision triggering the borrower’s liability in connection with making unreasonable and/or ungrounded objections (eg a penalty) or an obligation to indemnify the lender for losses (eg in the amount of the (unpaid) loan principal provided under a CLA and accrued interest, including for the period from the objection date to the Conversion date).

Where the “automatic” nature of a convertible loan is key for the purposes of the transaction, the lender may additionally consider the entry into a put option agreement with the borrower’s existing participants in respect of the participation interests held by the respective borrower’s participants.

3. Is “multiple” or “partial” Conversion possible?

As a commercial matter, it is often necessary to structure a CLA to permit multiple (including due to the existence of multiple lenders) and/or partial Conversions under a single CLA (where partial Conversion is taken to mean a situation where the lender at its discretion determines the loan portion to be converted into participation interest).

In our view, both “multiple” and “partial” Conversions should be allowed by virtue of the freedom of contract principle. However, in the absence of established case law on the matter,

we cannot exclude the risk of such Conversions being treated contrary to law or that such Conversions may be denied by a notary, registrar or the registration authorities – the Federal Tax Service of Russia (“**Federal Tax Service**”).

However, please note that we are aware of the notaries and registrars that share our view as to the possibility of “multiple” or “partial” Conversions and are prepared to certify a CLA containing such provisions or to effect the placement of shares in favour of the lender on such terms.

4. Is it possible to structure a CLA using a model other than the statutory one?

Before the legislative regulation of the convertible loan structure was introduced, convertible loans under Russian law were generally structured as follows.

The parties concluded a loan agreement and a shareholders’ agreement providing that the borrower’s participants are required to take all necessary actions to increase the charter capital in favour of the lender and to set off the obligation to repay the loan against the obligations to pay for participation interest.

An option agreement (an option to conclude an agreement) could also be entered into in order to make this model workable or as a separate convertible loan model.

The legislative regulation of a CLA structure raises the issue of both (i) enforceability of convertible loans structured before such legislative changes and (ii) the ability to structure convertible loans under a model different to the one provided for by new legislation.

Due to the lack of established court practice, we cannot exclude the risk that other structuring options may be deemed invalid because they differ from the statutory convertible loan structure. However, we are aware of arguments substantiating that other ways to structure the convertible loan are permissible.

5. Is a shareholders’ agreement required for the purposes of structuring a convertible loan?

There is no statutory requirement that a shareholders’ agreement be concluded alongside with a CLA. However, there are a number of issues which, in our view, can be more effectively dealt with in a shareholders’ agreement, partially because a shareholders’ agreement creates a contractual nexus with the borrower’s (ie the target company’s) shareholders while, most commonly, the parties to a CLA are the lender and the borrower only.

⁹ Part 18 of Article 19.1 of the LLC Law, part 7 of Article 27.5-9 of Federal Law No. 39-FZ “On the Securities Market” of 22 April 1996 (as amended) (“Securities Market Law”).

Therefore, a CLA that borrower's shareholders are not party to cannot regulate relationships involving obligations of the borrower's participants, and a separate agreement has to be concluded to impose direct contractual obligations on them.¹⁰ Below, we outline the key issues which can be regulated in such a shareholders' agreement:

I. A BAN ON INCREASING THE BORROWER'S CHARTER CAPITAL WITHOUT THE LENDER'S CONSENT;

For more details see [question 7](#) below.

II. A BAN ON THE BORROWER'S REORGANISATION WITHOUT THE LENDER'S CONSENT;

The current laws do not separately address the consequences of the borrower's reorganisation occurring between a CLA date and the Conversion date. To avoid the risks associated with initiating a reorganisation, we recommend including a ban on any acts aimed at reorganisation.

III. RESTRICTIONS ON THE TRANSFER OF PARTICIPATION INTERESTS OWNED BY THE BORROWER'S PARTICIPANTS;

The lender may be interested in ensuring that the composition of the borrower's participants remains unchanged by the time the lender carries out the Conversion. In such a case, the procedure for transferring the participation interests of the borrower's participants, including the creation of encumbrances on such participation interests, must be provided in the shareholders agreement.

IV A BAN ON FURTHER CONVERTIBLE LOANS WITHOUT THE LENDER'S CONSENT;

If further convertible loans are concluded without the lender's consent, this may result in both a dilution, in percentage terms, of the lender's participation interest after the Conversion and a change in the composition of the borrower's participants. Although this risk is hardly applicable to an NPJSC because it is impossible to register an issue of shares (or additional issue of shares) before the state registration of reports (submission of notices) on the results of previously registered issues of shares (see [question 7](#) below for more details), we recommend considering including such a ban in the shareholders agreement. This will help reduce the risks if the legislation changes in the future.

V THE PARTIES' OBLIGATION TO ENSURE THAT ALL NECESSARY ACTIONS ARE TAKEN TO IMPLEMENT A CLA;

As the legislation to regulate the convertible loan structure was introduced less than a year ago, there is no sufficient court practice or practice of other bodies involved (ie notaries, registrars, or the Federal Tax Service) in concluding and performing under convertible loan agreements. Therefore, we cannot exclude that the risks we have identified in these recommendations may materialise or that any other risks may emerge.

In this connection, it is recommended to include a provision in the shareholders agreement requiring the parties to take (and cause the borrower to take) all necessary actions to implement the parties' commercial arrangements for the performance of the convertible loan.

VI THE LENDER'S CONSENT TO THE BORROWER TAKING CERTAIN ACTIONS PRIOR TO THE CONVERSION;

The parties may agree that the borrower may only take certain actions with the lender's consent (eg concluding transactions exceeding a certain threshold or in relation to the borrower's certain assets). As a rule, such provisions are included in a CLA as an undertaking to refrain from certain actions, and the taking of such actions may be included in a CLA as a Conversion Event.

Such provisions may also be included in the shareholders agreement as an undertaking by a borrower's participant that is a party to the shareholders agreement to ensure that the borrower does not take certain actions without the lender's consent.

VII REGULATION OF THE PARTIES' RELATIONS AFTER THE CONVERSION;

Since, upon the Conversion, the lender becomes a participant of the borrower (or, if it is an existing participant of the borrower, increases the percentage of its participation interest in the borrower's charter capital), it may be commercially desirable to provide regulation, in advance, of certain corporate rights of the parties in connection with participation in the borrower's charter capital, and to provide for the parties' representations and obligations to indemnify the lender for its property losses in connection with the lender acquiring a participation interest in the borrower's charter capital (or an increase of the lender's participation interest in the charter capital) as a result of the Conversion.

¹⁰ In theory, there is no explicit legal prohibition on the borrower's participants being parties to a CLA and on a CLA containing provisions to address the abovementioned matters. However, we believe that it would be more practical and efficient to address such issues in a separate shareholders agreement.

VIII THE PARTIES' LIABILITY FOR FAILING TO FULFIL THEIR OBLIGATIONS UNDER THE SHAREHOLDERS' AGREEMENT OR A CLA;

The shareholders' agreement may include various measures of liability of the parties in connection with a failure to perform the obligations under the shareholders' agreement or under a CLA (eg a penalty, which is not prohibited under Russian law generally) and the conduct of claims clause, and means of enforcing the relevant obligations (eg options, restriction of voting rights, or irrevocable power of attorney).

As an additional measure, a breach of certain obligations under the shareholders' agreement may be included in a CLA as a Conversion Event.

In certain cases, the transaction documents structure may provide that a third party lender may acquire a minimum percentage of participation interest and/or create pledge over the participation interests in favour of the lender as instruments giving the lender additional control over the borrower. Please note that such instruments would make the structuring of the convertible loan more complicated and therefore could increase the time needed to grant the convertible loan.

6. Can information on a CLA be reflected in the USRLE?

Under Russian laws, information on a CLA must be recorded in the USRLE. The information on a CLA is required to be provided by the notary/registrar to the registration authority.¹¹

On 18 December 2021, amendments to Form No. P13014¹² came into force, whereby it is possible to reflect data on a CLA in the USRLE. As a reminder, the following information is recorded in the USRLE:¹³

- i. on a CLA concluded;

¹¹ Part 5 of Article 19.1 of the LLC Law; part 4 of Article 27.5-9 of the Securities Market Law.

¹² Order of the Federal Tax Services No. ED-7-14/948@ "On making amendments to the appendices to Order of the FTS of Russia No. ED-7-14/617@ of 31 August 2020" of 1 November 2021.

¹³ Part 5 of Article 19.1 of the LLC Law, paragraph 1.3 of part 1 of Article 5 of Federal Law No. 129-FZ "On State Registration of Legal Entities and Individual Entrepreneurs" of 8 August 2001 (as amended) ("State Registration Law").

¹⁴ Please note that this requires public disclosure of the investor's identity, which may be commercially sensitive.

¹⁵ Part 4 of Article 27.5-9 of the Securities Markets Law, paragraph 1.3 of part I of Article 5 of the State Registration Law.

¹⁶ We believe that such an indication is possible due to the provisions of paragraph 2 of part 4 of Article 19.1 of the LLC Law providing that (i) a CLA may set out the procedure for determining the nominal value (the amount by which the nominal

- ii. on the lender;¹⁴ and

- iii. on the amount (the maximum amount) of the participation interest which the lender may receive as a result of the Conversion.

In relation to the NPJSC, only the details of a concluded CLA are to be recorded in the USRLE.¹⁵

7. What happens if there is an increase in the borrower's charter capital between a CLA date and the Conversion date?

The conclusion of a CLA does not in itself prevent the borrower from increasing its charter capital in the future before the Conversion date, including without the lender's consent. Such increase of the borrower's charter capital will, most likely, result in the dilution of the participation interest which the lender may receive as a result of the Conversion.

Such risks could be reduced for the LLC by including a provision in a CLA that the Conversion is linked to the percentage of the participation interest rather than to its nominal value.¹⁶ In such a case, if the borrower's charter capital is subsequently increased, this will not dilute the lender's participation interest which it may receive as a result of the Conversion.¹⁷

However, Form No. P13014 requires that both the maximum size of the lender's participation interest after the Conversion and the nominal value of such participation interest must be indicated in the USRLE when entering information on the convertible loan in the USRLE. Accordingly, if there is an increase in the borrower's charter capital between a CLA date and the Conversion date, the maximum amount of the participation interest owing to the lender and the nominal value of such participation interest as recorded in the USRLE will not be the same.

Due to the lack of law enforcement practice on such matters, we cannot completely exclude the risk (although we consider it

value is to be increased) of the participation interest being acquired; and that

(ii) such procedure may depend on circumstances non-existing at the time of entry into a CLA.

¹⁷ We would like to draw to your attention that there is a considerable risk that the nominal value of the participation interest may not exceed the loan amount against which the value of the lender's contribution to the borrower's charter capital is set off (paragraph 2 of part 4 of Article 19.1 of the LLC Law, part 1 of Article 19 of the LLC Law). If such risk materialises, this will mean that if the borrower's charter capital is increased by an amount where the nominal value of the conversion participation interest is greater than the loan amount being converted into a participation interest, the Conversion cannot be carried out in full.

At the same time, paragraph 2 of part 2 of Article 32.3 of the JSC Law expressly provides that the price of placement of additional shares pursuant to a convertible loan agreement may not be lower than their nominal value.

to be low) that the Federal Tax Service will refuse to register the charter capital increase if the nominal value of the participation interest owing to the lender as a result of the Conversion exceeds the nominal value of the participation interest as stated in the USRLE.

In the case of NPJSC, the method proposed by us to mitigate the dilution risk would not be applicable because shares in NPJSC to be placed to the lender are to be issued before the Conversion and are to be of fixed quantity. At the same time, the current version of the securities issuance standards provides that the registration of an issue of shares (or an additional issue of shares) cannot be carried out before the state registration of reports (submission of notices) on the results of all previously registered issues of shares.¹⁸

Therefore, the charter capital of an NPJSC cannot be increased between a CLA date and the submission of a notice of the results of the Conversion share issue.

In addition to the above, we recommend including in the shareholders agreement, if such agreement is entered into along with a CLA, a ban on increasing the borrower's charter capital without the lender's consent (see [question 5](#) above for more details).

8. Are disputes arising out of a CLA arbitrable?

Russian laws¹⁹ establish a presumption of arbitrability (ie that disputes can be heard by an arbitral tribunal) of civil law disputes subject to the jurisdiction of state arbitrazh courts. There are, however, a number of exceptions to this presumption provided in the Arbitrazh Procedure Code of the Russian Federation ("**Arbitrazh Procedure Code**").²⁰

Depending on the subject matter of a dispute arising out of a CLA, the following categories of disputes can be distinguished in respect of which different arbitrability regimes apply:

I. NON-ARBITRABLE CORPORATE DISPUTES;

Not all disputes relating to a convertible loan may be submitted to arbitration. Such disputes are to be reviewed by state arbitrazh courts of the Russian Federation. The list of such non-arbitrable corporate disputes includes, inter alia (the following numbering is in accordance with part 1 of Article 225.1 of the Arbitrazh Procedure Code): (7) "*disputes concerning the convocation of a general meeting of participants of a legal entity*" and (9) "*disputes arising out of activities of notaries certifying transactions with participation interests in the charter capital of limited liability companies.*"

For example, disputes related to resolutions adopted by a general meeting of the borrower's participants in relation to the approval of a CLA and CLA-related increase of the charter capital may not be referred to an arbitration court *if* such disputes concern the convocation and/or challenge of resolutions of the relevant general meeting of the borrower's participants.

II. ARBITRABLE CORPORATE DISPUTES;

It appears that disputes relating to the lender's claim to increase in the borrower's charter capital (or to place the shares in the borrower with the lender) pursuant to a CLA should be classified as "disputes relating to the ownership of participation interests in the charter (pooled) capital of business companies" and such disputes will be "*unconditionally arbitrable*", ie they can be submitted to arbitration administered by a permanent arbitration institution ("**PAI**").²¹

However, since (i) disputes arising out of CLAs are not expressly set out as disputes relating to the ownership of participation interests in the Arbitrazh Procedure Code, and (ii) the list of corporate disputes is open, it is possible that such disputes arising out of CLAs are an "unnamed" type of corporate disputes not listed in part 1 of Article 225.1 of the Arbitrazh Procedure Code (rather than a dispute "*relating to the ownership of participation interests in the charter capital*

¹⁸ Section 5.28 of Regulation of the Bank of Russia No. 706-P "On the Securities Issuance Standards" of 19 December 2019 (as amended).

¹⁹ Part 1 of Article 33 of the Arbitrazh Procedure Code.

²⁰ It should also be mentioned that part 20 of Article 19.1 of the LLC Law and part 10 of Article 27.5-9 of the Securities Market Law provide that a claim to increase the borrower's charter capital is to be considered "in court" and that the state registration of amendments to a borrower's charter and to the information contained the USRLE (or the registrar carrying out a share placement transaction) must be carried out on the basis of an "arbitrazh court decision". We do not believe that the reference in part 20 of Article 19.1 of the LLC Law and part 10 of Article 27.5-9 of the Securities Markets Law to a decision of an "arbitrazh court" will be interpreted as an exception to the presumption of arbitrability of disputes

in relation to a convertible loan. The current laws contain multiple references to an "arbitrazh court" which do not imply that the relevant category of disputes are completely non-arbitrable (see, for example, paragraph 3 of part 11 of Article 21, paragraph 3 of part 12 of Article 21, and part 18 of Article 21 of the LLC Law).

²¹ The most relevant examples of Russian PAIs are: the ICAC at the Chamber of Commerce and Industry of the Russian Federation; the Russian Arbitration Centre at the Russian Institute of Contemporary Arbitration ("RAC"); and the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs.

Foreign PAIs: Hong Kong International Arbitration Centre (HKIAC); Vienna International Arbitration Centre (VIAC); International Court of Arbitration at the International Chamber of Commerce (ICC Court); and Singapore International Arbitration Centre (SIAC).

of business companies"). Such disputes are "conditionally arbitrable", ie they may be submitted to arbitration if only the following conditions are met:

- the arbitration must be administered by a PAI;
- the PAI has deposited the special Corporate Disputes Arbitration Rules;²²
- the place of arbitration must be in the Russian Federation; and
- the legal entity in respect of which the corporate dispute arose, and all its participants and other persons who are claimants or respondents have concluded an arbitration agreement to submit the corporate dispute to arbitration.

In our view, the safest approach when preparing a CLA is to comply with all the requirements set out above (including by concluding a separate arbitration agreement by all of the borrower's participants).

III. OTHER (NON-CORPORATE) DISPUTES.

Finally, disputes arising out of a CLA which do not fall under the category of corporate disputes may be referred to a PAI or another arbitration court which does not have the status of a PAI. Such disputes may include, for instance, (i) disputes relating to monetary claims and (ii) disputes relating to misrepresentations.

We do not recommend providing for a separate forum (eg an arbitration institution which does not have a PAI status) for such type of claims in a CLA, as this could lead to parallel arbitration proceedings and conflicting awards. The selection of a single arbitration forum in a CLA that is eligible to consider different types of CLA disputes would be a safer approach.

Please note, that we are aware of notaries who are prepared to certify a CLA which includes an arbitration clause and PAIs that are prepared to accept disputes arising out of a CLA which includes an arbitration clause.

9. What else should be taken into account when structuring a convertible loan?

When structuring a convertible loan, we also suggest considering the following points:

- i. if the borrower is an LLC and the lender is not its participant, you should make sure that the borrower's charter does not prohibit increasing the charter capital by third party contributions;²³
- ii. in addition to the subject matter, other "*material terms*" must be agreed in a CLA, such as the Conversion Events and the procedure for determining the share price (the amount by which the participation interest in the borrower's charter capital is increased) for the purposes of the Conversion.²⁴ When including such material terms in a CLA, we recommend using the wording that matches the statutory provisions to avoid the risk of a CLA being deemed not entered into;²⁵
- iii. to make the Conversion happen, the loan provided under a CLA must remain outstanding, such that the lender's claims to the borrower under a CLA be converted into equity. For this purpose, the borrower's voluntary prepayment right under a CLA must be restricted. As a general rule, the amount of an interest-free loan may be repaid early by the borrower, in whole or in part, without the lender's consent, whereas early repayment of an interest-bearing loan requires the lender's consent. However, a CLA may stipulate otherwise.²⁶ The laws on convertible loans regulate this matter to certain extent and provide that, *unless otherwise stipulated in a CLA*, from the scheduled maturity date of the until the expiry of the period for submitting a Conversion Request, the loan amount may only be repaid at the request of the lender and no interest must accrue for using the loan principal or for using another person's money.²⁷ We recommend drawing the commercial team's attention to these provisions when drafting a CLA;
- iv. literal interpretation of the law suggests that the occurrence of a Conversion Event may not mean that the loan has automatically become due and payable.²⁸ We therefore recommend that a CLA be carefully drafted and stipulate whether the provided loan falls due upon the occurrence of a Conversion Event;

²² For example, the RAC, the ICAC under the Chamber of Commerce and Industry of the Russian Federation or the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs. None of the foreign PAIs have deposited their Corporate Dispute Arbitration Rules.

²³ Part 2 of Article 19.1 of the LLC Law.

²⁴ Part 4 of Article 19.1 of the LLC Law, part 2 of Article 32.3 of the JSC Law.

²⁵ Part 1 of Article 432 of the Civil Code of the Russian Federation.

²⁶ Part 2 of Article 810 of the Civil Code of the Russian Federation.

²⁷ Part 6 of Article 19.1 of the LLC Law, part 3 of Article 32.3 of the JSC Law.

²⁸ Part 6 of Article 19.1 of the LLC Law, part 3 of Article 32.3 of the JSC Law.

- v. the notary must carry out the Conversion upon presentation of the requisite documents package that includes a document issued by the credit organisation confirming that the lender has fulfilled the conditions of a CLA to transfer the loan principal to the borrower.²⁹ Accordingly, if the loan amount is provided under a CLA by handing over cash to the borrower or in any other way for which banks would not be able to issue the relevant document, the notary may refuse to carry out the Conversion; and
- vi. we are aware of situations where the borrower is interested in being able to choose the method of performing an obligation under a CLA (ie either by repaying the loan or by the Conversion).³⁰ Based on the statutory model of a convertible loan, we believe that there is a risk that the borrower will be unable to enjoy this discretion. Such discretionary right of the borrower may be set out in a CLA, for example, as the lender's obligation to refrain from demanding the loan repayment if the borrower selects the Conversion as the method of performance under a CLA.

Contacts



Evgeny Glukhov

Partner

T +7 495 221 4474

Evgeny.Glukhov@dlapiper.com



Evgenia Kudryashova

Senior Associate

T +7 495 221 4448

Evgenia.Kudryashova@dlapiper.com



Ivan Sezin

Legal Director

T +7 495 221 4432

ivan.sezin@dlapiper.com



Mikhail Bychikhin

Senior Associate

T +7 495 221 4179

Mikhail.Bychikhin@dlapiper.com



Andrei Sheetkin

Legal Director

T +7 495 221 4481

Andrei.Sheetkin@dlapiper.com



Roman Abu Salekh

Associate

T +7 495 2214194

Roman.AbuSalekh@dlapiper.com

²⁹ Paragraph 2 of part 2 of Article 103.13 of the Fundamentals of Legislation of the Russian Federation on Notaries, approved by the Supreme Soviet of the Russian Federation on 11 February 1993 No. 4462-1.

³⁰ We note that, as a rule, such structure is not acceptable for investors (ie lenders) and, because of that, has not been widely accepted in the practice of convertible loans.