

# CLIENT UPDATE

## ADOPTION OF SECOND BUNDLE OF AMENDMENTS TO THE RUSSIAN CIVIL CODE

### MOSCOW

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- On April 24, 2013 the State Duma of the Russian Federation approved the draft Federal Law on Amendments to Part One, Section I, Subsections 4 and 5 and Part Three, Article 1153 of the Civil Code of the Russian Federation in the third reading. On April 27, 2013 the law was approved by the Federation Council. On May 7, 2013 Federal Law No. 100-FZ was signed by the President of Russia.
- We note that amendments to the Civil Code are to be phased in gradually.
- We draw your attention to the fact that the adoption of the first bundle of amendments to Chapter 4 (Legal Entities) previously scheduled for January 2013 has not yet taken place. Instead, amendments to Part One, Section I, Subsections 4 and 5 of the Civil Code were approved.
- This update looks at the more important amendments affecting existing provisions on transactions, agency and time limitations, as well as new provisions on resolutions adopted at meetings.

- The amendments take effect from September 1, 2013.<sup>1</sup>
- The amendments will generally apply to legal relations that arise after the effective date of the above federal law. For any legal relations already in place prior to this date, the amendments will apply only to those rights and obligations that arise after such date.

## FORM OF TRANSACTIONS

- A written form of contract for cross-border transactions is no longer obligatory.
- Claims may be asserted in the event of failure to notarize a contract or carry out the state registration thereof within a period of one year (this period was previously three years).
- The concept of “**legal notices**” has been introduced, i.e., notices that have civil law implications under the law or the terms of the transaction (e.g., statements, notifications, notices, etc.). Such legal notices are effective upon the receipt thereof by the addressee, and it is the addressee that bears the risk of the notice not being duly served if he is at fault or if he does not read it.
- Provisions relating to conditional transactions have not been amended in the final draft of the law, thus, the problem of potestative conditions possibly being applied remains unresolved.

## RESOLUTIONS AT MEETINGS

- As noted above, the Civil Code has been complemented with brand-new provisions of Chapter 9<sup>1</sup>, dealing with the resolutions adopted at meetings. It is noteworthy, that the term “meeting” shall be construed broadly there since the provisions of this chapter do not only cover the meetings of shareholders of a legal entity, but also the meetings of creditors in insolvency proceedings and etc.
- The provisions of Chapter 9<sup>1</sup> apply, unless otherwise provided for by the law or as prescribed by the law.
- Thus, in general, resolutions are adopted by a simple majority where the quorum constitutes at least 50%.
- There must be a separate resolution for each item of the agenda, unless otherwise unanimously agreed at the meeting.

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<sup>1</sup> The supplementary wording in Art. 177 of the Civil Code providing for the invalidation of a transaction entered into with an individual who is subsequently found to be legally incapacitated will take effect on March 2, 2015.

- If a resolution is adopted in breach of the requirements laid down by the law it may be invalidated/challenged, unless the law stipulates that it is to be deemed void on any of the following grounds:
  - the resolution is on a matter not included in the agenda (other than when all shareholders are in attendance at the meeting);
  - the resolution is passed in the absence of a quorum;
  - the resolution does not fall within the competence of the meeting; and
  - the resolution contravenes the principles of public policy and morality.
- Examples of grounds for the voidability of resolutions taken at meetings include:
  - breach of the concept of equality of shareholder rights at meetings;
  - a person taking part in the meeting did not have the authority to do so; and
  - material breach of the procedure for the convocation, preparation and conduct of the meeting or drawing up of the minutes.
- A resolution may be challenged by a shareholder that did not take part in the voting or that voted against the resolution. A shareholder that voted in favor of a resolution may challenge such resolution if there was a violation of his right to express his will. However, a resolution will not be invalidated if the vote of the shareholder challenging the resolution could not have had an impact on the resolution and the resolution does not give rise to any material adverse consequences for such shareholder.
- The challenge must be mounted within a period of 6 months from the time the claimant became or should have become aware of the violation of his rights, but not more than 2 years from the date when information about the resolution became public.
- These new provisions apply to resolutions taken after the effective date of the amendments indicated above.

## AGENCY AND POWER OF ATTORNEY

- There is no longer a requirement to place a seal on a power of attorney issued in the name of a legal entity.
- A delegable power of attorney issued by a legal entity or the head of its branch/representative office no longer needs to be notarized.
- The concept of an **irrevocable power of attorney** is introduced in business. Such power of attorney, firstly, must be notarized; secondly, may be cancelled in the event of improper use by the agent; and thirdly, it is not delegable.

- In addition to a power of attorney, authority may now also devolve from a contract or resolution of a meeting, in which case the provisions on power of attorney shall apply thereto.
- Powers of attorney for filing applications with the Unified State Register of Rights to Immovable Property and administering rights registered in state registers must be notarized. However, it is not clear at the present time whether this requirement applies to shareholder registers.
- The maximum validity period of three years for powers of attorney has been abolished.
- A power of attorney ceases to be effective in the event of the reorganization of the legal entity that results in its dissolution.
- An announcement on cancellation of a power of attorney may be published in the Unified Federal Register of Information on the Activities of Legal Entities (<http://www.fedresurs.ru/>). In such case third parties shall be deemed to have been duly notified of the cancellation of the power of attorney one month after such publication.
- A transaction performed by an agent in respect of himself or in respect of another represented party is not declared void, as previously. It is deemed voidable if a suit is brought by the represented party alleging that it infringes on his interests (which is presumed unless proven otherwise).
- If a transaction is consummated by a person without the proper authority, the counterparty may unilaterally repudiate the transaction before it is approved by the person on behalf of whom the unauthorized person was acting (unless the counterparty was aware that the person was acting without the proper authority). A counterparty may also unilaterally repudiate a transaction and claim compensation for damages if the person on behalf of whom the unauthorized person was acting chooses not to approve the transaction (again, unless the counterparty was aware that the person was acting without the proper authority).

## STATUTE OF LIMITATIONS

- The amendments establish an overall period of limitation, which may not exceed ten years from the date of infringement of the right (even where such period begins from the date when the person became aware or should have become aware of the infringement of the right).

- In general, the limitation period is calculated from the date when the person became aware or should have become aware of the infringement of the right and of the identity of the person that should be deemed the proper defendant cited in any claim.
- Unilateral action (such as set-off, direct debiting, etc.) aimed at the exercise of a right in respect of which the statute of limitations has expired is not permitted.
- The expiration of the statute of limitations in respect of the principal claim implies the expiration of the statute of limitations in respect of any additional claim (for interest, liquidated damages, etc.), even if the additional claim arose after the expiration of the statute of limitations in respect of the principal claim.

## GROUNDINGS AND IMPLICATIONS OF INVALIDATION OF TRANSACTIONS

- The amendments primarily affected the **general provisions on invalidation** of transactions.
- A claim to have a transaction declared void and the implications thereof apply may now be made not by any interested party, but only by a party to the transaction or a person stipulated by law.
- A claim to have a voidable transaction declared invalid may only be made if the transaction infringes on the rights and interests of the person disputing the transaction.
- A person whose conduct implies the will to preserve a transaction forfeits the right to petition for invalidation of the transaction.
- The courts will no longer have blanket discretion to apply the consequences of voiding a transaction, but may now only do so at their discretion to protect the public interest and for other reasons set forth in the law.
- A claim for invalidation of a transaction will have no legal bearing if the claimant is not acting in good faith, (e.g., if such person's conduct led others to rely on the validity of the transaction).
- A person who was aware or should have been aware that there were grounds for invalidation of a transaction cannot be deemed to have acted in good faith after the transaction is declared invalid.
- A court is entitled not to apply the consequences of invalidation of a transaction if this would contravene the principles of public policy and morality.
- The amendments also dealt with a number of **new specific grounds** for invalidation of transactions.

- If a transaction does not conform to the law or other legislative or regulatory acts (Art. 168 of the Civil Code), as a general rule it is voidable (and not void, as was the case previously), unless the law expressly treats it as void or unless the transaction infringes on the public interest or the rights of third parties
- The confiscation to the state treasury of everything received under a transaction that contravenes the principles of public policy and morality is now no longer automatic, but at the discretion of the courts.
- A transaction performed by a legal entity without the license required to undertake the relevant activity is now no longer deemed invalid.
- A transaction concluded on fraudulent terms may be challenged whether the fraud is active or passive (non-disclosure of information), and whether the fraud is perpetrated by a party to the transaction or a third party, if the former was aware of the fraud (e.g., a person is deemed to have been aware of fraud if the fraud was perpetrated by its employees or representatives).
- The concept of “material misconception” in relation to which a transaction may be deemed invalid has been broadened. Now, a misconception is deemed to be material not only if it relates to the nature of the transaction or the material qualities of its subject matter, but also if it relates to any facts that, if known to a party, would have allowed such party to make a reasonable and unbiased assessment of the situation and not enter into the transaction. E.g., the misconception could be in relation to a party entering into the transaction or another party related to the transaction. The misconception could also relate to a fact or circumstance that a party alluded to in expressing its will, or that it was clear to the other party this party assumed to be true when entering into the transaction. Thus, this ground for invalidation could cover a breach of the representations & warranties made to a counterparty, or any other circumstances that a counterparty warranted were true, knowing that the other party placed its reliance in them. However, a transaction cannot be deemed invalid if:
  - The misconception related to the motives behind a transaction; or
  - The other party declares that it agrees to enter into the transaction on the terms on which the other party’s misconception was based.
- In addition, the court, in order to protect the counterparty’s lawful interests, may refuse to deem the transaction invalid if such counterparty, acting with ordinary care, in any event was unable to determine that the first party acted under misconception while entering the transaction.

- The amending law also introduced **a number of new grounds for invalidation of transactions.**
- A transaction consummated without the required approval of a third party, governmental body or corporate body may be challenged if the other party to the transaction was aware or should have been aware that no such approval had been given. Other consequences of failure to obtain approval may be laid down by the law or the terms of the contract. A person that has approved a transaction cannot subsequently challenge such transaction on grounds of which it was aware or should have been aware prior to issuing such approval.
- A transaction entered into under a power of attorney, or a transaction entered into by a corporate body acting on behalf of a legal entity without a power of attorney may be challenged if it is concluded to the detriment of the represented party or the legal entity, and the other party to the transaction was aware or should have been aware of the patent damage caused to these persons.
- A transaction entered into in breach of a prohibition on the disposition of assets arising from the operation of the law (e.g., during bankruptcy proceedings) is void. A transaction entered into in breach of a prohibition on the disposition of the assets of a debtor imposed by a judicial or other body as prescribed by the law in favor of a creditor or other authorized person does not impede the exercise of the rights of such creditor or other authorized person secured by such prohibition, unless the purchaser of the assets was not aware or should not have been aware of the existence of such prohibition.

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Please do not hesitate to contact us if you have any questions.

May 29, 2013