

FURTHER IMPROVEMENT OF THE INVESTMENT CLIMATE IN RUSSIA AS A RESULT OF MODERNIZATION OF THE RUSSIAN CIVIL CODE

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This article traces the history, and discusses some of the recent changes in the Russian Federation Civil Code, which result in a more favorable business climate in Russia. In particular, it discusses the development of changes related to the documentation of contracts, expansion in the durations and uses of powers of attorney, and the modernization of the statute of limitations period for bringing an action.

Keywords: Russian civil law; investment climate; Russian studies.

The Civil Code of the Russian Federation [hereinafter Code] consists of four parts.¹ Part One became effective as of January 1, 1995,² Part Two – as of March 1, 1996, Part Three – as of March 1, 2002, Part Four – as of January 1, 2008. This demonstrates that preparation of the Code had been lasting gradually; the time difference between enacting the first part of the Code and the enacting last one exceeded 13 years. So long a period is quite understandable, since a lot of time and efforts were needed for transforming our legal system from that appropriate for regulating a planned economy to that regulating a market economy.

Meanwhile, in February 2012, the President of the Russian Federation initiated modernization of the Code by introducing in the State Duma a draft law [hereinafter Draft Law] containing amendments.³ The aim of this modernization is to make the Code even more consistent with a market economy.

¹ Гражданский кодекс Российской Федерации [*Grazhdanskii Kodeks Rossiiskoi Federatsii* [Civil Code of the Russian Federation]], available in English in a version with changes only through 2003 at <<http://www.russian-civil-code.com>> (accessed Jan. 29, 2015).

² Chapter 4 'Legal Entities' was accepted as of the date of the official publication of Part One of the Code, i.e. as of November 8, 1994.

³ Проект федерального закона № 47538-6 «О внесении изменений в части первую, вторую, третью и четвертую Гражданского кодекса Российской Федерации, а также в отдельные законодательные

The Draft Law was preceded by a Presidential Decree on the Concept of the Development of the Civil Legislation of the Russian Federation [hereinafter Concept], elaborated by a special group of scholars and legal practitioners under the patronage of the President.⁴

The amendments contained in the Draft Law are being implemented step by step, which is, in itself, an indication of the thoroughness of our legislative bodies in undertaking such an important matter. This process is not yet completed, so it makes sense to concentrate on the novelties already adopted. In particular, this article focuses on three improvements: documentation of contracts, powers of attorney, and statutes of limitations.

1. Documentation of Contracts

To start with, let me discuss changes to the rules concerning transactions requiring written form, and the legal consequence of the correct form not being observed.

Traditionally these legal consequences were that, in the case of a dispute, the parties to such a transaction are not entitled to refer to witness testimony in order to confirm the existence of the transaction and the terms and conditions thereof. They are, however, allowed to use written and other evidence.⁵

акты Российской Федерации» [*Proekt federal'nogo zakona No. 47538-6 'O vnesenii izmenenii v chasti pervuyu, vtoruyu, tret'yu i chetvertuyu Grazhdanskogo kodeksa Rossiiskoi Federatsii, a takzhe v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii'*] [Bill No. 47538-6 'On Amendments to Parts One, Two, Three and Four of the Russian Civil Code, and to Individual Acts of Legislation of the Russian Federation']] (April 3, 2012). This Draft Law, passed in first reading on April 27, 2012, was initially expected to be implemented at once, was subjected to much commentary and eventually was broken down into several parts, which have each been or are being considered individually. See, e.g., Федеральный закон от 30 декабря 2012 г. № 302-ФЗ «О внесении изменений в главы 1, 2, 3 и 4 части первой Гражданского кодекса Российской Федерации» [*Federal'nyi zakon ot 30 dekabrya 2012 g. No. 302-FZ 'O vnesenii izmenenii v glavy 1, 2, 3 i 4 chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii'*] [Federal Law No. 302-FZ of December 30, 2012, 'On Amendments to Chapters 1, 2, 3 and 4 of Part One of the Civil Code of the Russian Federation']] (effective March 1, 2013); Федеральный закон от 7 мая 2013 г. № 100-ФЗ «О внесении изменений в подразделы 4 и 5 раздела I части первой и статью 1153 части третьей Гражданского кодекса Российской Федерации» [*Federal'nyi zakon ot 7 maya 2013 g. No. 100-FZ 'O vnesenii izmenenii v podrazdely 4 i 5 razdela I chasti pervoi i stat'yu 1153 chasti tret'ei Grazhdanskogo kodeksa Rossiiskoi Federatsii'*] [Federal Law No. 100-FZ of May 7, 2013, 'On Amendments to Subsections 4 and 5 of Section I of Part One and the Article 1153 of Part Three of the Civil Code of the Russian Federation']] (effective September 1, 2013); Федеральный закон от 2 июля 2013 г. № 142-ФЗ «О внесении изменений в подраздел 3 раздела I части первой Гражданского кодекса Российской Федерации» [*Federal'nyi zakon ot 2 iyulya 2013 g. No. 142-FZ 'O vnesenii izmenenii v podrazdel 3 razdela I chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii'*] [Federal Law No. 142-FZ of July 2, 2013, 'On Amendments to Subsection 3 of Section I of Part One of the Civil Code of the Russian Federation']] (effective October 1, 2013).

⁴ See Вестник Высшего Арбитражного Суда Российской Федерации. 2009. № 11. С. 8–99 [*Vestnik Vyshchego Arbitrazhnogo Suda Rossiiskoi Federatsii*. 2009. No. 11. S. 8–99 [2009(11) Bulletin of the Supreme State Arbitration Court of the Russian Federation 8–99]], available at <<http://base.garant.ru/12176781>> (accessed Jan. 29, 2015).

⁵ See Гражданский кодекс РСФСР [*Grazhdanskii kodeks RSFSR*] [Civil Code of the Russian Soviet Federative Socialist Republic], Art. 64 (1964); Civil Code of the Russian Federation, Part One, Art. 162(1) (1995).

The written form of a foreign trade transaction, in particular, has a history of its own. Previously, of course, there was a state monopoly of foreign trade in the Soviet Union. This state monopoly meant that only those organizations to whom the right had specifically been granted were entitled to operate in international markets, and foreign trade activities of such organizations were under strict state control.

With regard to the written form of foreign trade transactions the state control was manifested in two aspects. First, a foreign trade transaction had to be signed by two persons on behalf of any Soviet organization that was a party to the transaction.⁶ Second, in case of failure to comply with the rules concerning the written form of a foreign trade transaction and the procedure of signing thereof the transaction had to be deemed null and void.⁷ These rules were under strict judicial control. As an illustrative case, there was a foreign trade contract, signed by two persons on behalf of the Soviet participant, which was at some later stage was supplemented by an additional protocol, signed by one person on behalf of the Soviet participant. The Foreign Trade Arbitration Commission of the Chamber of Commerce and Industry of the USSR⁸ declared the protocol null and void.⁹

However, reconstruction of our economy under a market model was accompanied by gradual reducing of the state monopoly on foreign trade, finally abolished by the Decree of the President of the Russian Federation of November 15, 1991, 'On Liberalization of Foreign Economic Activity in the Russian Federation.'

In line with this trend, requirements concerning the written form were gradually softened. It is worthwhile to note that, according to the Fundamentals of the Civil Legislation of the USSR and Republics of May 31, 1991, 'non-observance of the form of foreign economic transactions shall result in invalidity of the transaction' (Art. 30(2)).¹⁰ There was no reference in this text to non-observance of the procedure of signing a foreign trade transaction. In practical terms, this meant that a foreign economic transaction might be signed by one person on behalf of the Soviet participant.

⁶ See Постановление Совета Министров СССР от 14 февраля 1978 г. № 122 «О порядке подписания внешнеторговых сделок» [*Postanovlenie Soveta Ministrov SSSR ot 14 fevralya 1978 g. No. 122 'O poryadke podpisaniya vneshnetorgovykh sdelok'*] [Decree of the Council of Ministers of the USSR No. 122 of February 14, 1978, 'On the Procedure of Signing of Foreign Trade Transactions'], Sec. 1.

⁷ Civil Code of the Russian Soviet Federative Socialist Republic, Art. 45 (1964).

⁸ The predecessor to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

⁹ See Арбитражная практика: Практика внешнеторговой арбитражной комиссии, 1971–1974 гг. Ч. 7 [*Arbitrazhnaya praktika: Praktika vneshnetorgovoi arbitrazhnoi komissii, 1971–1974. Ch. 7*] [7 Arbitration Practice: Practice of the Foreign Trade Arbitration Commission]] 8–9 (Chamber of Commerce and Industry of the USSR 1979).

¹⁰ The Fundamentals were to become effective as of January 1, 1992, however by that time the USSR ceased to exist. Nevertheless, since the Fundamentals contained rules consistent with a market economy, the Fundamentals were incorporated into the laws of the Russian Federation by the Decree of the President of the Russian Federation of July 14, 1992.

A similar approach was adopted by the Code, Part One, effective as of January 1, 1995.¹¹

Further simplification of requirements in relation to the written form of foreign economic transactions is connected with the Concept.¹²

The Concept states, *inter alia*, that the rule of Art. 162(3) of the Code on invalidity of a foreign trade transaction concluded without observance of the simple written form was introduced in the Russian law when a state monopoly of foreign trade was in place. Currently such a rule is no longer justified since it puts parties to foreign economic transactions in unequal positions compared with parties to domestic transactions. Therefore it should be abolished.¹³

Further to this statement, according to the Federal Law No. 100-FZ of May 7, 2013, 'On Introducing of Amendments in Subsections 4 and 5 of Section I of Part One and the Article 1153 of Part Three of the Civil Code of the Russian Federation', Art. 162(3) of the Code ceased to be effective as of September 1, 2013.

This means that, now, failure to observe the written form of a foreign economic transaction will lead to consequences described in the Art. 162(1), *i.e.* prohibition, in case of a dispute, to refer to witness testimony to confirm the fact of the transaction and its terms and conditions; but written and other proofs may be used as supporting evidence.

In other words, the new version of Art. 162 of the Code provides identical consequences for failure to observe the required written form of transactions both in domestic and foreign transactions.

It makes sense to deal with the kinds of admissible evidence in some detail. The notion 'written evidence' embraces any documents containing information on circumstances relevant to the case, such as contracts, statements, references, business correspondence, *etc.*¹⁴

As for other evidence to prove the existence of a non-written contract, the parties may introduce, for example, tangible evidence; in other words any object which by its appearance, features, place of location or other indicia may serve as a means of establishment of circumstances relevant to the case.¹⁵

¹¹ See Code, *supra* n. 1, Art. 162(3) of the unamended version.

¹² *Supra*, n. 4.

¹³ Concept, *supra* n. 4, pt. II, sec. 4, subsec. 4.1.4.

¹⁴ See Арбитражный процессуальный кодекс Российской Федерации [Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii [Arbitration Procedural Code of the Russian Federation]], Art. 75(1); Гражданский процессуальный кодекс Российской Федерации [Grazhdanskii protsessual'nyi kodeks Rossiiskoi Federatsii [Civil Procedural Code of the Russian Federation]], Art 71(1).

¹⁵ See Arbitration Procedural Code of the Russian Federation, Art. 78(1); Civil Procedural Code of the Russian Federation, Art 73.

Meanwhile a question arises whether the prohibition to use witness testimony should be interpreted as a prohibition of any oral evidence. Both the Arbitration Procedural Code and the Civil Procedural Code contain rules relating to such kinds of oral evidence as written testimony, on the one hand, and explanations of persons participating in the case (plaintiff, respondent, third party participants, *etc.*), on the other.¹⁶ The prohibition in question is limited to witness testimony and not extended to explanations of persons participating in the case. Therefore such explanations may be used as supporting evidence in order to prove the fact of a transaction, its terms and conditions.

Moreover, if one litigant (*e.g.*, a plaintiff) makes some statement in relation to certain circumstances and another litigant (a respondent) does not contest it, no further evidence is needed to prove these circumstances.¹⁷ In the case of discrepancies between explanations of the litigants, the court should assess those explanations in conjunction with all other evidence.¹⁸ These rules are now applicable both to domestic transactions and foreign trade ones, so parties of transactions of either kind are now in equal positions.

2. Powers of Attorney

Substantial innovations were also introduced in the rules relating to a power of attorney, almost significantly, to the period of its validity. Previously, this period could not exceed three years; whereas in cases where the period was not specified, the power of attorney was valid for only one year from the date of its issuance.¹⁹ Currently (as of September 1, 2013) Art. 186(1) reads: 'If a power of attorney does not specify a period of validity, the power of attorney shall be valid during one year from the date of its issuance.' The provision governing the outer length of a power of attorney is omitted. Therefore, now a power of attorney may be issued for a period exceeding three years (5 years or even longer).

Another very important amendment is contained in Art. 188.1 that provides the possibility to issue an irrevocable power of attorney with regard to an obligation in the sphere of business activity. Such a power of attorney cannot be revoked until expiration of the period of its validity, or may be revoked only in certain cases specified in the power of attorney. Such a power of attorney should be notarized. These rules create new possibilities for persons involved both in consumer and business transactions.

¹⁶ See Arbitration Procedural Code of the Russian Federation, Arts. 81 and 88; Civil Procedural Code of the Russian Federation, Arts. 68 and 69.

¹⁷ Arbitration Procedural Code of the Russian Federation, Art. 70.

¹⁸ See Arbitration Procedural Code of the Russian Federation, Art. 71(1); Civil Procedural Code of the Russian Federation, Art 67(1).

¹⁹ See Code, *supra* n. 1, Art. 186(1) of the unamended version.

3. Statute of Limitations

One more sphere where the rules of the Code were substantially renewed was the statute of limitation, which is defined as the ‘term for protection of a right upon a suit by a person whose right is violated.’²⁰ This description is traditional and unamended. The general limitation period remains the same (three years) but novelties touch such issues as its starting point and factors influencing its duration (*i.e.* its interruption and suspension).

As it appears from the definition above, until a right is violated, no judicial protection is needed, so a time limitation period cannot commence prior to the violation of a right. However, the fact of violation is, in and of itself, insufficient to trigger a judicial protection mechanism. First, this fact should become known to the rightholder, because only after it is known can the latter take care to protect his violated right. Second, even after the rightholder became aware of violation of his right, he would be unable to apply for judicial protection until identification of a person of the respondent since a suit cannot be brought ‘to whom it may concern.’

Of course, if a time limitation period is long (*e.g.*, in such countries as Austria, Belgium, France, Germany it amounts to 30 years with respect to some claims), a rightholder has plenty of time both to discover the fact of violation and find the wrongdoer.

Meanwhile in countries where this period is much shorter, such as the three year period in Russia, it may well happen that by the moment the statute of limitations expires, the respondent is not yet identified. In previous Russian Civil Codes of the Soviet era, a short time limitation period was balanced by a rule of reinstatement of this period in case a rightholder missed the limitation deadline for a justified reason.²¹

However, under the Code that became effective in Part One as of January 1, 1995,²² reinstatement of the limitation period was absolutely prohibited for legal entities, and was available for natural persons only in exceptional situations such as disease or helpless condition, illiteracy, *etc.*²³

The combination of a short time limitation period and impossibility of its reinstatement created a threat for a rightholder to lose judicial protection of his violated right when the statute of limitations expired, regardless of the rightholder’s inability to identify the respondent due to circumstances beyond his control.

²⁰ Code, *supra* n. 1, Art. 195.

²¹ See, *e.g.*, Civil Code of the Russian Soviet Federative Socialist Republic, Art. 49 (1924); Civil Code of the Russian Soviet Federative Socialist Republic, Art. 87 (1964). According to this Code (Art. 83), the starting point for the running of the limitation period coincided with the date when a rightholder became, or ought to have become, aware of violation of his right.

²² The starting point of running of the time limitation period was the same as that provided in the Civil Code of 1964. See Code, *supra* n. 1, Art. 200(1) of the unamended version.

²³ *Id.* at Art. 205.

It would be reasonable and fair to prevent such a situation, and recently the Code was amended to this effect. Now, the current version of Art. 200(1) reads: 'Unless otherwise provided by law, running of the time limitation period shall commence from the date when a person became or ought to have become aware of the violation of his right *and of a person who is the proper respondent in the suit on protection of this right*' (emphasis added). There is no doubt that a three year term starting from this date is quite sufficient for a rightholder to make up his mind whether to apply to a court for judicial protection of his violated right.

Meanwhile it should be noted that, as it is stated in UNIDROIT Principles of International Commercial Contracts 2010 [hereinafter Principles],²⁴ there should be:

[A] balance between the conflicting interests of the obligee and the obligor of a dormant claim. An obligee shall have a reasonable chance to pursue its right, and should therefore not be prevented from pursuing its right by the lapse of time before the right becomes due and can be enforced. Furthermore, the obligee should know or at least have chance to know its right and the identity of the obligor. On the other hand, the obligee should be able to close its files after some time regardless of the obligor's knowledge, and consequently a maximum period should be established.

Given this approach, Art. 10.2 of the Principles reads:

- (1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised.
- (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

In line with these provisions Art. 196 of the Code (the amended version) states:

1. The general time limitation period shall be three years from the date to be determined in accordance with Article 200 of this Code.²⁵

²⁴ UNIDROIT Principles of International Commercial Contracts 2010 347 (UNIDROIT 2010), available at <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>> (accessed Jan. 29, 2015).

²⁵ Article 200(1) connects the starting moment of the statute of limitations with the date when a rightholder becomes (or ought to become) aware of the violation of his right and of the wrongdoer (see above). According to Art. 191 of the Code '[r]unning of a term determined by a period of time shall commence of the next day after a calendar date or occurrence of an event whereby its start is defined.' Therefore the moment limitation period begins to run is identically determined both in the Principles and in the Code.

2. The time limitation period cannot exceed ten years from the date of violation of the right for whose protection this period is established.

One can see that the rules of the Principles aimed at establishing a balance between the opposite interests of the rightholder and the wrongdoer are reflected in the amended version of the Code.

The statute of limitations may be extended due to its interruption or suspension. In the case of an interruption, running of the limitation period shall start anew; the period that lapsed prior to interruption shall not be included in the new term. Traditionally the Russian Civil Codes provided for interruption of the time limitation period in two situations: (1) in case of acknowledgement of the debt by an obligor, and (2) in case of bringing a suit in due course.²⁶ In the first situation, a rightholder may approach a court for judicial protection of his violated right at any moment within the new time limitation period. The second situation, however, may create a problem. Consideration of a complex case could conceivably take a long enough time period to exceed the limitation; so by the moment of its expiry the case will not yet be finally resolved. This could unfairly limit a plaintiff's flexibility in pursuing his complaint.

In order to prevent such a situation, the Principles (Art. 10.5(1)(a)) provide that the time limitation period is suspended 'when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor.'²⁷ Furthermore (Art. 10.5(2)): 'Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated.'²⁸ This approach is now shared by the Code. According to the amended version of Art. 204(1) '[t]he time limitation period shall be tolled from the date of application to a court in due course for protection of the violated right during the whole time period within which the judicial protection of the violated right is being performed.'

This rule, taken by the Code from the Principles, which are a kind of *lex mercatoria*, makes judicial protection of violated rights more effective.

The new version of the Code distinguishes a general time limitation period, on the one hand, and a maximum time limitation period, on the other. While the general period is three years, the total maximum period for judicial protection of a violated right is now 10 years from the date of violation of the right. Thus, it makes sense to discover a correlation between these two terms and, in particular, to establish whether (and if so, on what conditions) an interruption of the general time limitation period may result in extension of the maximum time limitation period.

²⁶ See, e.g., Civil Code of the Russian Soviet Federative Socialist Republic, Art. 50 (1924); Civil Code of the Russian Soviet Federative Socialist Republic, Art. 86 (1964); Code, *supra* n. 1, Art. 203 of the unamended version.

²⁷ UNIDROIT Principles, *supra* n. 24, at 356.

²⁸ *Id.*

The answer to this question is contained in the Principles. Article 10.4 reads:

(1) Where the obligor before the expiration of the general limitation period acknowledged the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgment.

(2) The maximum general limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Article 10.2(1).²⁹

As it is explained in the Official Comment on this Article,

[t]he commencement of a new general limitation period following acknowledgment can take place either during the general limitation period under Article 10.2(1), or during the maximum limitation period under Article 10.2(2). While the maximum limitation period will not in itself begin again, the new general limitation period may exceed the maximum period by up to three years if the obligor acknowledges the right of the obligee after more than seven years but before the maximum period has already expired.³⁰

Given that the Code rules with regard to the general time limitation period and maximum time limitation period are similar to those of the UNIDROIT Principles 2010, both Art. 10.4 of the Principles and the Official Comment, it may be helpful in determining a correlation between these time limitation periods in terms of the Russian law. According to the Preamble to the Principles they may be used, *inter alia*, 'to interpret or supplement domestic law.'

To summarize, modernization of the Code, albeit it is not yet completed, introduced innovations based upon well-established international commercial practices, and ensured more effective legal protection of rights belonging both to domestic and foreign investors operating on the Russian market, which in turn results in further improvement of the Russian investment climate.

References

UNIDROIT Principles of International Commercial Contracts 2010 347, 353–54, 356 (UNIDROIT 2010), available at <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>> (accessed Jan. 29, 2015).

Арбитражная практика: Практика внешнеторговой арбитражной комиссии, 1971–1974 гг. Ч. 7 [*Arbitrazhnaya praktika: Praktika vneshnetorgovoi arbitrazhnoi komissii*,

²⁹ UNIDROIT Principles, *supra* n. 24, at 353.

³⁰ *Id.* at 354.

1971–1974. Ch. 7 [7 Arbitration Practice: Practice of the Foreign Trade Arbitration Commission]] 8–9 (Chamber of Commerce and Industry of the USSR 1979).

Гражданский кодекс Российской Федерации [*Grazhdanskii Kodeks Rossiiskoi Federatsii*] [Civil Code of the Russian Federation]], available at <<http://www.russian-civil-code.com>> (accessed Jan. 29, 2015).

Концепция развития гражданского законодательства Российской Федерации // Вестник Высшего Арбитражного Суда Российской Федерации. 2009. № 11. С. 8–99 [*Kontsepsiya razvitiya grazhdanskogo zakonodatel'stva Rossiiskoi Federatsii*] // *Vestnik Vyshchego Arbitrazhnogo Suda Rossiiskoi Federatsii*. 2009. No. 11. S. 8–99 [Concept of the Development of the Civil Legislation of the Russian Federation, 2009(11) Bulletin of the Supreme State Arbitration Court of the Russian Federation 8–99]], available at <<http://base.garant.ru/12176781>> (accessed Jan. 29, 2015).

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