

LEGAL ENTITIES 2014

On 1st September companies start a new life



Yet more amendments have been introduced to the Civil Code regarding legal entities.

One of the novelties is that all legal entities will be divided into corporations and unitary enterprises. Corporations will include legal entities in which shareholders have corporate interests (business partnerships and companies, cooperatives, public organizations, etc.).

Unitary enterprises will include legal entities whose founders have ownership interests in such legal entities' property but do not become their shareholders (state and municipal unitary enterprises, foundations, establishments).

The law introduces the notion of a "non-operating legal entity" with a view to fighting the so-called fly-by-night companies. A legal entity may be recognized as non-operating if it fails to file its financial statements during twelve months as prescribed by the tax laws and does not make transactions in at least one bank account.

Such entity will be excluded from the Unified State Register of Legal Entities according to a simplified procedure.

The law sets out a procedure for corporation shareholders to exercise their rights and obligations. Special attention is paid to the right of shareholders to challenge transactions completed by the company—shareholders will be required to take reasonable measures to notify other shareholders. Company shareholders who do not join a lawsuit will not have the right to subsequently take the same claims to court. This provision is expected to reduce the number of lawsuits filed by shareholders and help achieve more stability in commercial transactions.

The proposed amendments aim at filling in the gap between the existing legislation and practice.

The amendments will take effect on 1 September 2014.

*Federal Law No. 99-FZ
dated 5 May 2014*

Dear Readers,

We are pleased to bring you a new issue of our Legal Express covering the most significant legislative changes related to entrepreneurial activities that took place in Russia over the summer months of 2014.

The reform of Russian civil legislation is underway. Accordingly, joint-stock companies will no longer be divided into 'open' and 'closed' ones, but will be classified as public and non-public ones.

Depending on its legal form, a company will be required to have resolutions of the general meeting certified by a notary, a registrar, or otherwise. Consequently, a resolution adopted by the general shareholders' meeting in an LLC, as well as the list of the LLC shareholders who attended the meeting when that resolution was adopted must be confirmed by the LLC through a notary or otherwise as prescribed by the charter or the unanimous resolution of the general shareholders' meeting.

The so-called "four eyes" principle has been incorporated into the Civil Code. Now a company may have several directors acting jointly or independently of each other.

You can find more details on these and other news stories in the current issue of our Legal Express.

We hope you enjoy reading it!

Best regards,

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Antitrust

General Exclusions Extended

The duration of the so-called 'general exclusions' in respect of sale and purchase contracts and R&D contracts has been extended by five years. These exclusions contain the provisions that allow—subject to certain conditions (such as a seller's market share being less than 35%, no competition between the buyer and the seller)—to incorporate into contracts terms and conditions that are normally prohibited by the antitrust laws. In particular, there may be terms and conditions that result in dividing the market into territories, and terms and conditions that prohibit the buyer from manufacturing, buying and/or selling goods that are interchangeable with the seller's goods.

It should be remembered that there were also other changes proposed during the discussion of the Resolution to extend these exclusions. In particular, it was proposed that this Resolution should include general exclusions for automakers and auto dealers. However, in view of the Code of Conduct for automakers and auto distributors adopted in December 2013, these amendments were omitted from the final version of the Resolution.

*Resolution of the Russian Government
No. 385 dated 29 April 2014*

Fourth Antitrust Package Back before the Government Again

On 4 June 2014, the Federal Antimonopoly Service of Russia submitted for approval to the Russian Government a new version of the law on the protection of competition known as the fourth antitrust package. Earlier this bill had been returned to its authors for fine-tuning because of active resistance from the business community.

The bill contains numerous amendments that would—as the Federal Antimonopoly Service believes—lead to easing the administrative burden on business and promoting competition in Russia.

In particular, these amendments propose that:

- legal entities should be obligated to seek approval of the Federal Antimonopoly Service to set up joint ventures in Russia;
- the powers of the Presidium of the Federal Antimonopoly Service should be ascertained insofar as it concerns issuing legal acts; and
- antimonopoly requirements should be determined with respect to setting up business entities that will be more than 50% state-owned.

The provisions that were especially harshly criticized by the business community (such as applying the protection of competition law to results of intellectual activity) have been omitted from the bill.

Relation between the Law on Advertising and the Law on the Protection of Competition

The Federal Antimonopoly Service has clarified the periods of limitation for imposing liability for dissemination of false information, improper comparisons, and misleading consumers.

The Federal Antimonopoly Service has stated that if information is disseminated in a manner that shows indications of unfair competition not only through advertising, but also by other means (product labels, correspondence with counterparties), the person in question will be subject to liability for violation of the antitrust laws under article 14.33 of the Russian Code of Administrative Offenses. If inaccurate information is disseminated through advertising only, the person in question will be subject to liability for violation of the advertising law under article 14.3 of the Russian Code of Administrative Offenses.

Even though the sanctions for these offenses are similar, the one-year period of limitation for administrative liability is different in that it starts running from the effective date of a decision made by the antimonopoly authority that has found the offense in case of violation of the antitrust laws

and from the time the offense is committed in case of violation of the advertising law.

*Clarifications of FAS
dated 25 June 2014*

Banking

Rules for Opening and Closing Bank Accounts

A new Instruction of the Bank of Russia for opening and closing bank accounts took effect on 1 July 2014:

- in accordance with the changes in the civil legislation, special bank accounts have been introduced, including nominal, pledge, and escrow accounts;
- a new form of a bank specimen signature card has been introduced; and
- the provisions requiring the 'second' signature (in a bank specimen signature card) have been omitted.

*Instruction of the Bank of Russia
No. 153-I dated 30 May 2014*

Exchange of Information with Foreign Tax Authorities

A new law has been enacted concerning special considerations related to the performance of financial transactions with foreign individuals and legal entities.

The new law provides for the obligation of Russian financial market organizations (banks, insurance and investment companies, etc.) to identify among their clients foreign taxpayers: Russian citizens that have dual citizenship (except for the member states of the Customs Union) and companies that are controlled by such persons, directly or indirectly, and to transmit information about these client to the Russian Federal Tax Service, the Bank of Russia, and the Russian Federal Financial Monitoring Service. Administrative liability is introduced for financial market organizations for failure to notify, or improper notification of, these authorities.

Financial market organizations will have the right to transmit information about their clients that are foreign taxpayers to foreign tax authorities subject to the consent of the clients.

Where clients refuse to provide details of their dual citizenship or to give their consent to transmitting their information to foreign tax authorities, the financial market organization may terminate financial transactions or rescind the contract.

The law obligates foreign financial market organizations located outside Russia to communicate to the Russian Federal Tax Service details of bank accounts opened with them by Russian citizens or organizations controlled, directly or indirectly, by Russian citizens.

*Federal Law No. 173-FZ
dated 28 June 2014*

Scope of Application of the Law “On Credit Histories” Expanded

The procedure for creating, storing, and using credit histories has been improved:

- the list of information materials to be transmitted to a bureau of credit histories has been expanded, including details of arrears on alimony payments, housing bills, telecommunications, and utilities;
- the list of credit history subjects has been expanded to include: (1) sureties; (2) principals under bank guarantees; and debtors owing payments for housing, utilities, telecommunication services or alimony, provided there is an effective and not yet enforced court decision to recover (earlier only the borrower was a credit history subject);
- the list of information materials that are reflected in one’s credit history has been expanded to include, in particular, previous passport details, the full cost of loans, legally incapability details, as well as the maximum credit card limit;

- a procedure has been set out for reflecting in one’s credit history the assignment of claims under a loan (credit) agreement.

The law will take effect on 1 March 2015, except for certain specified provisions.

*Federal Law No. 189-FZ
dated 28 June 2014*

Bankruptcy

Procedure for Maintaining Accounts and Current Payments in Bankruptcy

The Plenum of the Supreme *Arbitrazh* Court of the Russian Federation has issued two rulings on controlling payments in the event of bankruptcy. According to the new requirements, banks will have to verify third-party payment orders (in particular, those under writs of execution) and that the debtor itself is under supervision or financial rehabilitation to make sure that the priority order requirements are met, provided the bank is, or should be, aware of the payer’s insolvency, in particular, after the relevant announcement is made.

The bank may also verify instructions coming from the receiver during the receivership stage, if violation of the bankruptcy law is obvious to any reasonable person.

The arbitration manager will be permitted to deviate from the order of priority of current payments if this deviation is in the interests of the debtor in bankruptcy proceedings (for example, with a view to preventing damage to the debtor’s assets, and where the debtor’s employees resign).

Deposits from participants in the bidding process for the sale of the debtor’s assets must be credited to a separate account. It has also been established that where a general claim is novated, its regime will be determined by the date the original obligation was incurred—i.e., some of the ways for reclassifying general claims as current ones have now been excluded.

*Ruling of the RFSAC Plenum
No. 37 dated 6 June 2014*

Civil Law

Rescission of a Contract: Position of the Supreme *Arbitrazh* Court

The Plenum of the Supreme *Arbitrazh* Court of the Russian Federation has clarified the effects of rescission of a contract.

The Supreme *Arbitrazh* Court of the Russian Federation has established that the effects of rescission of a contract, other than those stipulated by law, may be provided for by an agreement between the parties with account taken of the restrictions imposed on freedom of contract.

Surviving Obligations

The court has pointed out that upon rescission of a contract, the debtor’s obligations will be terminated, including the obligation to pay a penalty for failure to perform, or improper performance of, the obligations that is accrued only until the day the contract is rescinded. Nevertheless, the obligations that are supposed to remain in full force and effect by virtue of their nature (for example, warranty obligations, arbitration clauses, applicable law clauses, etc.) or if their purpose is to govern relations between the parties after the date of rescission will survive the rescission.

Return of Contract Deliverables

Notwithstanding the grounds for rescission of a contract, the party bound to return the property will indemnify the other party for all the gains derived from the use, consumption, or processing of the property (for example, the value of wear and tear, interest accrued on money, etc.) less the necessary expenses incurred to maintain such property.

Deterioration and Loss of Property to be Returned

If property is lost, deteriorated, etc., the party bound to return it will compensate for any (including accidental) loss or deterioration, if the contract is rescinded due to that party’s default on its obligations. Otherwise, that party will compensate for the shortage or

deterioration of the property, if it has disposed of or consumed that property, or exercised significantly less care in safekeeping that property than an ordinary participant in business practices would have.

Lease and Loan Payments

Where a lease contract is rescinded, payments for the use of the property will continue until the property is returned to the lessor.

Where a loan agreement is rescinded, all the terms and conditions concerning interest, liquidated damages, and all the security obligations will remain in full force and effect until the parties have fully performed their obligations to return the property.

*Ruling of the RFSAC Plenum
No. 35 dated 6 June 2014*

Pledge and Novation in a New Way

The new provisions of the Civil Code concerning pledge and substitution of persons in an obligation took effect on 1 July 2014.

I. Pledge

Termination of Pledge Where Pledged Property is Acquired by a Good Faith Purchaser

The new version of the Russian Civil Code expressly stipulates that a pledge will be terminated if the pledged property is acquired for consideration by a good faith purchaser, i.e., a person who was not, or should not have been, aware of such pledge. Thus, the Russian Civil Code has affirmed the position of *arbitrazh* courts.

Regulation of Subsequent and Preceding Pledges

Currently, when the preceding pledgee levies execution on the pledged property, the subsequent pledgee may demand that the debtor should perform the obligation early (if the pledged property proves insufficient to satisfy the subsequent pledgee's claims), or may at the same time levy execution on the pledged property, if the pledgee fails to perform the obligation early.

If the subsequent pledgee fails to exercise the right to demand early performance, its right of pledge will be terminated when the preceding pledgee levies execution on the pledged property.

Exclusion of Prohibition on Subsequent Pledge by Agreement

Now, the preceding pledgee may not incorporate into an agreement with the pledgor a clause prohibiting the pledgor from encumbering the pledged property with a subsequent pledge. Nevertheless, an agreement with the preceding pledgee may contain the terms and conditions whereby a subsequent pledge agreement may be entered into.

Registration of Notices of Pledge

Effective on 1 July, pledgers or pledgees can file notices of pledge with a notary for the purposes of registration. This registration is significant for determining the priority where pledgees' claims are satisfied: a registered pledgee will have a priority over pledgees registered later or not registered at all.

Pledge Management Agreement

Pledge-secured creditors may select, and enter into a pledge management agreement with, a pledge manager. This is permitted only if the primary obligation is related to the entrepreneurial activities of the parties.

II. Substitution of Persons in an Obligation

Assignment of Future Claims

The new rules of the Russian Civil Code permit the assignment of a future claim arising out of obligations that have not yet been incurred and out of contracts that have not yet been entered into. This assignment may be made only between the parties to entrepreneurial activities.

Partial Assignment of a Right to Claim Arising out of a Monetary Obligation

The Russian Civil Code has expressly stipulated that a right to claim arising out of a monetary obligation may pass to another person in part, unless otherwise stipulated by law.

Limits of Liability of Initial Debtor where Debt is Assigned

The Russian Civil Code has stipulated that where an outstanding obligation related to the parties carrying out entrepreneurial activities is assigned, the initial and subsequent debtors will be jointly and severally liable to the creditor, unless the debt assignment agreement provides for secondary liability, or unless the initial debtor is released from the obligation.

Corporate

Ruling of the RFSAC Plenum on Major Transactions

The Plenum of the Supreme *Arbitrazh* Court of the Russian Federation has issued clarifications on challenging major and interested party transactions.

Thus, a transaction approved by the general meeting may be invalidated, if the other party to the transaction knew or ought to have known of the clear damage to the company. Moreover, the other party is presumed to have been aware of the fact that the transaction was clearly a loss-making one for the company that was the counterparty to the transaction, if, for example, it was obvious at the time the transaction was entered into that the company's liabilities exceeded twice or more the other party's liabilities.

It has been clarified that the overall period of limitation for lawsuits seeking the invalidation of major and interested party transactions is one year, which begins to run in any event not later than the date of the general meeting of shareholders held at the end of the relevant fiscal year. It is the end of April for LLCs, and the end of June for joint-stock companies. It is presumed that a shareholder must become aware of a transaction being performed in violation of the approval procedure not later than that date. The Ruling introduces the figure of a "good faith counterparty." It is a person that, acting in good faith and exercising reasonable care, could have nonetheless apparently established

that the transaction in question showed indications of a major or interested party transaction and failure to comply with the approval procedure.

In particular, the Plenum of the Supreme Arbitrazh Court of the Russian Federation has clarified whether an employment agreement may be classified as a major or interested party transaction. The Supreme Arbitrazh Court of the Russian Federation believes that the provisions of the Law "On Limited Liability Companies" and of the Law "On Joint-Stock Companies" do not hinder that, but the circumstances of the case should be taken into account in each particular instance. The fact of an employment agreement being a major transaction may be evidenced by the terms and conditions that provide for payments to be made to an employee that amount to 25% or more of the book value of the company's assets. Such payments may mean, for example:

- one-time or recurring payments upon dismissal and/or the occurrence of new circumstances;
- salary for the duration of the employment agreement.

The Ruling was published on the website of the Supreme Arbitrazh Court on 28 May 2014.

Ruling of the RFSAC Plenum No. 28 dated 16 May 2014

Authorized Capital of an LLC: Payment Procedure

The procedure for paying in the authorized capital of an LLC at the time of establishment has been altered. An LLC may be registered before its authorized capital is paid in. Each founder must pay in his or her share in full within the time period set in the charter. However, in any event, the term of payment must not exceed four months after the date of registration of the LLC. It should be remembered that previously 50% of the authorized capital had to have been paid in before a company was registered, which increased the period of establishment of new LLCs.

The law took effect on 5 May 2014.

Federal Law No. 129-FZ dated 5 May 2014

Employment

Refusal to Enter into an Employment Agreement

The State Duma is considering a bill concerning changes to the Labour Code that proposes setting a 7-day time limit for the employer to provide a written substantiation to a job applicant if the employer refuses to enter into an employment agreement with him or her.

The current version of the Labour Code obligates the employer to provide a written substantiation of the refusal to enter into an employment agreement with a job applicant if the job applicant requests it, but there is no time limit set for providing such substantiation. Accordingly, in the opinion of the authors of the bill, this rule is not operating because it does not in fact allow charging the employer with liability.

Bill No. 549514-6 >>

Protection against Layoffs

A bill has been submitted to the State Duma proposing to complicate the procedure for dismissing persons of pre-pension age (two years before the pension age occurs). According to this bill, such employees will have preferential right to retain employment during layoffs or staff reduction.

Bill No. 558255-6 >>

Real Estate and Construction

Land Code to be Altered

Numerous amendments have been made to the Russian Land Code. The most extensive changes concern the procedure for allotting a land plot. These set out the composition of all necessary documents, the procedure and the time limits for making deci-

sions, and the grounds for the refusal to allot a land plot.

From now on, the sale of land plots and the execution of agreements for the lease of land plots owned by the state or municipalities will be carried out solely in a bidding held in the form of an auction. The law provides for special considerations related to an agreement for the lease of a state- or municipality-owned land plot.

One of the novelties is the possibility of exchanging a land plot owned by the state or a municipality for a privately-owned one. This exchange is possible where a privately-owned land plot is seized for state needs. Moreover, any difference in the kinds of permitted use will not hinder such exchange.

The law will take effect on 1 March 2015, except for certain specified provisions.

Federal Law No. 171-FZ dated 23 June 2014

Notarization of Transactions

A bill has been submitted to the State Duma providing for the notarization of all transactions in real estate and other assets that will be subsequently subject to state registration. Currently, a transaction involving the passage of title to real estate may be performed in simple written form.

The bill is expected to take effect 1 January 2015.

Bill No. 552089-6 >>

Securities Market

Creation of a National Payment Card System

An operator of a national payment card system (NPCS) will be established in the form of an OJSC that will be wholly owned by the Bank of Russia.

The law provides for:

- the definition of the notion of "important payment system" and the criteria for attributing a system to this category;

- the definition of the notion of “national payment system” and the criteria for attributing a system to this category;
- the obligation of important payment systems to arrange for liaison with the NPCCS operations and payment clearing centres;
- the prohibition of payment system operators from unilaterally terminating services for their clients, and fines for violation of that prohibition;
- the need for payment system operators that are not nationally important to pay a security deposit;
- a new procedure for increasing and introducing new rates (by notifying the Bank of Russia along with a mandatory rationale for changes in the rates);
- the procedure for creating and operating a national payment card system has been set out.

The law took effect on 5 May 2014, except for certain specified provisions.

*Federal Law No. 112-FZ
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