

ВАЛЕРИЙ МУСИН

## Modernisation of the Russian Civil Code: Initial Steps

The Civil Code of the Russian Federation consists of 4 parts which were adopted and became effective in the period 1994–2008. Application of its rules, both in commercial and judicial practice, has not confirmed their viability. Still, from the beginning of the 1990s, when Part One of the Code was drafted, a lot of water has flowed under the bridge (as in the popular English proverb), and some substantial economic and social developments have occurred in Russia, which should be reflected in our civil law.

That was the background of the Decree of the President of the Russian Federation of 18 July 2008 N 1108 *On the Improvement of the Civil Code of the Russian Federation* which triggered preparation of the Concept of the Development of Civil Legislation of the Russian Federation<sup>1</sup>.

The Concept served as a basis for the draft federal law: on the Introduction of Amendments to Parts One, Two, Three and Four of the Civil Code of the Russian Federation as well as in certain Legislative Acts of the Russian Federation which was published in a Russian Newspaper on 7 February 2012, and then submitted by the President of the Russian Federation to the State Duma (a Chamber of the Federal Assembly of the Russian Federation, i.e. of the Russian Parliament).

The main idea of the Concept and, accordingly, of the draft law, is to find a proper balance between private and public elements in civil law. On the one hand, since civil law is of a private nature, a private law method of regulation should prevail in civil law norms. On the other hand, this does not exclude application of public law instruments (fixed in the rules of administrative and criminal law) when appropriate.

To review the whole Civil Code from this perspective is, indeed, a very difficult task, requiring a lot of time and effort. That is why the realization of this task is being performed gradually, so at this stage only initial steps have been taken.

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1 V. *Bulletin of the Supreme State Arbitration Court of the Russian Federation*, No. 11, 2009, p. 8–99.

First of all, the Concept emphasizes the necessity of ensuring good faith and proper use of civil law rights and performance of civil law duties. In order to achieve this aim, the good faith principle should be recognized as one of the most general and important principles of civil law.

It should be noted that, generally speaking, the significance of good faith behavior of participants in civil law relations had already been reflected in the RF Civil Code. Its original version had provided that when protection of civil rights is preconditioned by law with good faith behavior of the rightholders, their good faith is implied (See: Article 10 Limits of Realization of Civil Law Rights, Section 5, as adopted by the Federal Law of 30 November 1994 N 52-FL).

However, currently, as a result of implementation of the ideas contained in the Concept, this rule is placed at a higher level.

The Federal Law of 30 December 2012 N 302 FL introduced some amendments to Article 1 of the Civil Code, which is headed Basic Principles of Civil Legislation. Now its Sections 3 and 4 read as follows:

3. In the course of establishment, realization and protection of civil law rights and performance of civil law duties, participants in civil law relations must act in good faith.
4. Nobody is entitled to gain any privilege out of his illegal or bad faith behavior.

Being placed in Article 1 (dealing with the basic principles of civil legislation), the quoted rules shall be deemed as basic principles which are, in other words, none other than elements of the public policy of the Russian Federation, i.e. fundamentals of the Russian legal system (See: Article 1193 of the Civil Code).

Therefore, non-observance of the good faith principle, in legal terms, means violation of the public policy of the Russian Federation. Such an approach is very substantial, both for domestic and foreign markets.

It means, *inter alia*, that where there is a court judgment or an arbitral award based upon bad faith behavior, issued either in Russia or abroad, it shall not be subject to enforcement in Russia since its enforcement would permit a litigant who acted in bad faith to gain a privilege out of his bad faith behavior, which is inconsistent with the fundamental principles of Russian law, i.e. with the public policy of the Russian Federation.

Some new rules relate to transactions and legal consequences thereof.

Similar to the original text of the Code (See: Article 166 of the Civil Code), its amended version differentiates two groups of invalid transactions: voidable transactions (those whose invalidity should be recognized by the court) and void transactions (whose invalidity does not depend upon such recognition).

However, accents have now shifted. Previously, a transaction inconsistent with a law or other legal act was deemed voidable unless a law declared it to be void (see: Article 168, the original version).

Now (as of 1 September 2013), the situation is different. A transaction inconsistent with a law or other legal act shall be deemed voidable.

It shall be deemed void if it contradicts the public interest or violates the rights or legitimate interests of third parties (See: Article 168 as amended by the Federal Law of 7 May 2013 N 100-FL).

Currently, the approach of the Code with regard to the legal consequences of invalid transactions has, to some extent, deviated from what existed earlier. As for the general rule, it is the same: restitution *in integrum* (See: Article 167 (Section 2) of both versions).

However, in relation to certain kinds of invalid transactions, legal consequences are now different from those which existed earlier. For example, a transaction concluded with the aim of knowingly contradicting the fundamentals of the legal order or morality was deemed void, and if both parties acted willfully, in cases where the transaction was executed, everything received by them had to be confiscated by the Federal Treasury (See: Article 169, the original version).

Currently (as of 1 September 2013), such a transaction shall also be deemed void, albeit its consequences will be those as provided by Article 167 of the Code (i.e. *restitutio in integrum*). As for confiscation, its application is now preconditioned by two circumstances:

- such consequences should be expressly established by law, and
- it depends upon the court's discretion, since, according to the text of the new version of Article 169, the court may (rather than shall) act this way.

Some amendments (mainly of ascertaining character) have been introduced into the rules concerning transactions concluded under the influence of delusion. Both earlier and now, such a transaction shall be deemed voidable and may be recognized as invalid by a court provided the delusion was substantial (See: Article 178 of the Code). However, the original version simply declared a necessity for a delusion to be substantial without any details. Meanwhile, Article 178 in its amended version explains the meaning of this notion.

A delusion shall be deemed substantial if the party refrained from conclusion of the transaction because he was unaware of the actual situation (See: Article 178, Section 1).

Section 2 of this Article now contains an illustrative list of kinds of substantial delusion, such as:

- a party made an evident error (e.g. typo, slip);
- a party misunderstood substantial features of the subject of the transaction;
- a party misunderstood the nature of the transaction;
- a party mistook a person with whom the transaction was concluded or who was connected with the transaction;

- a party misunderstood the circumstance mentioned in his statement as a precondition for conclusion of the transaction.

There is also an additional provision in Article 178 (Section 4), according to which a transaction shall not be declared invalid if the other party gives his consent for the transaction to remain valid, upon conditions assumed by the confusing party when entering into the transaction.

In such a case, a court judgment refusing recognition of the invalidity of the transaction should indicate those conditions.

With regard to transactions concluded under the influence of fraud, Article 179, in its current version, specifically deals with a situation where a person enters into a transaction under the influence of fraud committed by a third party. In such a case, an aggrieved party is entitled to apply to a court for recognition that this transaction is invalid, provided the other party knew or should have known about the fraud. Such knowledge shall be deemed as existing when the third person was an employee or representative of the other party or assisted this party in conclusion of the transaction (See: Article 179, Section 2, Paragraph 3).

The Federal Law of 7 May 2013 N 100-FL supplemented the Civil Code with a new Chapter 91 Decisions of Meetings. The background of the introduction to this chapter is apparently the complex legal nature of such an act.

When, e.g. the consent of all (or at least the majority - simple or, perhaps, qualified) a company's shareholders is needed for the company to enter into a certain transaction, a relevant decision is aimed at achievement of some civil law consequences (i.e. creation, change or termination of civil law rights and duties), and to that extent – similar to a transaction.

Still, this is similar but not identical. The crux is that nobody may be bound by a transaction (as its party or beneficiary) without his consent. At the same time, a decision of a meeting is binding upon all persons entitled to participate in it (See: Article 181<sup>1</sup>, Section 2) including those who did not attend the meeting or voted against the decision. That is why a decision of a meeting, from the standpoint of its legal nature, is an act *sui generis*.

With due consideration of these peculiarities of meetings decisions, Chapter 91 regulates the procedure for taking decisions, their contents and challenges thereof.

Decisions of meetings may be taken either in the course of joint attendance of the participants or by correspondence and should be reflected in the written minutes (See: Article 181<sup>2</sup> of the Code).

As with transactions, decisions of meetings which are inconsistent with mandatory rules shall be deemed voidable (i.e. they may be declared invalid by a court) or void (when their invalidity does not depend upon a court's judgment). A decision shall be deemed voidable if:

- there is a substantial violation of the procedure of the convening, preparation and performance of the meeting which affected formation of the participants' will;
- a person who spoke on behalf of a participant of the meeting was not authorized to do so;
- equality of the participants' rights was violated in the course of the meeting;
- rules of preparation of the minutes were substantially violated, e.g. where there were no written minutes (See: Article 181<sup>4</sup>, Section 1 of the Code).

A decision shall be deemed void if it:

- is taken in the absence of the quorum;
- is taken in an issue beyond the competence of the meeting;
- contradicts the fundamentals of legal order or morality (See: Article 181<sup>5</sup> of the Code);
- a decision of a meeting may be challenged in court by a participant who voted against it. Those who voted for it or abstained may challenge the decision provided their will in the course of voting was affected (See: Article 181<sup>4</sup>, Section 3 of the Code).

A statement of a claim to declare the decision of a meeting invalid may be filed with a court within six months of the date when a person whose rights have been violated by the decision became (or had to become) aware of it. The claim must be made at the latest within two years of the date when the decision became publicly available to participants of the relevant civil law community (See: Article 181<sup>4</sup>, Section 5 of the Code).

There are also some new rules concerning the power of attorney. Previously, the ultimate term of validity of the power was limited to three years from the date of its issuance (See: Article 186, Section 1 of the Code, the original version). The only exception to this rule related to a notarized power of attorney designated for application abroad. Such a power of attorney was valid until its revocation by the principal (See: Article 186, Section 2).

This exclusion remains in existence, but the current version of Section 1 of Article 186 (as introduced by the Federal Law of 7 May 2013 N 100-FL) does not contain any indication to the ultimate period of validity of a power of attorney. This means that, as of 1 September 2013, this period shall depend upon the principal's discretion.

Earlier, a principal was entitled to revoke a power of attorney at any time (See: Article 188, Section 2 of the Code, the original version).

Currently, this rule is accompanied by a reference to Article 1881 (introduced by the Federal Law of 7 May 2013 N 100-FL). This new Article provides the possibility for a principal to issue an irrevocable power of attorney. Such a possibility is preconditioned by the following factors:

- a power of attorney is issued in connection with an obligation in the sphere of business activity;
- a power of attorney is notarized.

It should, however, be noted that irrevocability of such a power of attorney does not have an absolute character.

The power of attorney may be revoked when:

- the relevant obligation is terminated;
- a representative abuses his rights;
- there are circumstances clearly indicating that such an abuse of rights may occur.

Substantial amendments have been introduced by the Federal Law of 7 May 2013 N 100-FL to rules relating to the time limitation period. In general terms, it remains the same (3 years), albeit there are certain innovations with regard to the starting point of this period and its interruption.

A time limitation period is a term for judicial protection of a violated right (See: Article 195 of the Code). This means that until a right is violated, there is nothing to protect, so this period cannot commence, even theoretically.

As soon as a right is violated, it needs judicial protection. It is worth, however, noting that in order to take any steps aimed at the protection of the violated right, an aggrieved person should at least become aware of such a violation. Moreover, in practical terms, an aggrieved person (as a plaintiff) may only file a statement of claim with a court provided the wrongdoer (i.e. a respondent) is also known.

Therefore, theoretically, the time limitation period may commence from the moment when:

- the right is violated;
- the rightholder became (or should have become) aware of the violation;
- the rightholder became (or should have become) aware of both the fact of the violation and of the person who is liable for it.

All these three variations have been known to Russian civil law if reviewed from the point of view of a historical retrospective. According to the Civil Code of the RSFSR<sup>2</sup> 1922, the starting point of the time limitation period coincided with the moment of violation of the right (See: Article 45). The Civil Code of the RSFSR 1964 shifted this point to the moment when an aggrieved person became (or should have become) aware of the fact of the violation of his right (See: Article 83). The same concept was shared by the original version of the RF Civil Code whose Part One became effective as of 1 January 1995 (See: Article 200, Section 1).

The Federal Law of 7 May 2013 N 100-FL substantially amended this approach in two aspects:

- it attributed the starting point of the time limitation period to the date when a person became (or should have become) aware of the violation of his right and

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2 RSFSR – the Russian Soviet Federation Socialist Republic as the part of the USSR.

of the person who is a proper respondent in the case of judicial protection of this right (See: Article 200, Section 1 of the Code, the new version);

- it established the ultimate length of the time limitation period – ten years from the date of violation of the right (See: Article 196, Section 2 of the Code, the new version).

As for interruption of the time limitation period, it traditionally occurred in two situations: 1) filing a statement of claim in due course, and 2) recognition of a debt by the debtor (See: Article 50 of the Civil Code 1922, Article 86 of the Civil Code 1964<sup>3</sup>, Article 203 of the RF Civil Code, the original version). In either situation the time limitation period after its termination shall run anew.

At the same time, in the first situation, when a case had been repeatedly reviewed by courts of different levels, there was a possibility of expiration of the time limitation period (that commenced anew after filing a statement of claim with the trial court) prior to the date when the case would have been finally resolved.

In order to prevent such a situation, the Civil Code now provides that the time limitation period shall not run from the date of application to a court in due course for protection of the violated right and during the whole period of time within which the judicial protection of this right is being performed (See: Article 204, Section 1 of the Code, the new version).

Therefore, currently, the only ground for interruption of the time limitation period is the debtor's act evidencing recognition of the debt (See: Article 203 of the Code, the new version).

Further amendments will apparently be introduced into the RF Civil Code in the near future.

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3 According to Article 86 of the Civil Code 1964 recognition of a debt by the debtor interrupted the time limitation period only in disputes with involvement of natural persons.

SUMMARY

**Modernisation of the Russian civil code: initial steps**

The aim of the study is to present the initial steps in modernisation of the civil code of the Russian Federation. The author presents the selected aspect of the challenges according to the modernisation of the law system in order to answer some substantial economic and social developments that have occurred in Russia and should be reflected in civil law regulation.

KEYWORDS: civil law, modernisation, Russian Federation law system