

# ANDREY GORODISSKY & PARTNERS

## NEWSLETTER

### REVIEW OF THE NOTABLE CHANGES IN LEGISLATION

No. 3/2010  
March 2010

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#### **State Registration**

On March 9, 2010 the Resolution of the RF Government "On Amendment and Repeal of Certain Acts of the Government of the Russian Federation", No. 135, was adopted, by which the competence of the Federal Tax Service (FTS) and the RF Ministry of Finance has been altered.

For the purpose of making the competence of government authorities consistent with the amended civil legislation, registration of franchise agreements has been excluded from the competence of FTS. At the same time FTS has been authorized to approve the forms for applications, notices and notifications to be submitted for the purpose of state registration of legal entities and individual entrepreneurs. FTS has also been authorized to approve the requirements for submission of documents to the registration authority and the content of a document certifying the recordation in the Consolidated State Register of Legal Entities and the Consolidated State Register of Individual Entrepreneurs.

#### **Court Practice** **Position of the RF Constitutional Court**

Recently the Constitutional Court (CC) issued a number of Resolutions concerning the application of procedural law provisions on re-trial of cases in connection with newly discovered facts and challenging of court acts by way of supervision.

1. On March 19, 2010 the RF Constitutional Court issued the Resolution "On the matter relating to checking of constitutionality of Article 397, part two, of the RF Code of Civil Procedure in connection with the complaints of I.V. Amosova, T.T. Vasilieva, K.N. Zhestkova and others", No. 7-P. By the said Resolution Article 397, part two, of the RF Code of Civil Procedure is held to be inconsistent with the Constitution of the Russian Federation insofar as it prevents the challenging, by cassation (appeal), of trial courts' rulings satisfying requests for review of court resolutions in connection with newly discovered facts.

According to Article 397, part 2, of the RF Code of Civil Procedure, a trial court's ruling satisfying a request for review of a court's decision or ruling or a supervisory court's resolution in connection with newly discovered facts may not be appealed. CC has found this provision to be unconstitutional, stating that the re-trial of a matter in connection with newly discovered facts and,

consequently, the setting aside of an effective court's act create for parties to the matter special consequences, thus affecting their rights and duties. Procedural legislation should provide protective mechanisms against unsubstantiated setting aside of court acts and the possibility of correcting a judicial error. CC has pointed out the existing risk of unlawful or even arbitrary setting aside of effective court acts in connection with newly discovered facts, which leads to the infringement upon citizens' rights to protection by court and to the impossibility of restoration of infringed rights. CC has once again pointed out the necessity of equal treatment of similar relations by legislation and to the inadmissibility of limitation of citizens' procedural rights, stating that currently the procedural law provisions (RF Code of Arbitration Procedure and the RF Code of Civil Procedure) differently treat relations concerning similar issues. The Code of Arbitration Procedure allows for the challenging of a ruling on re-trial of a matter in connection with newly discovered facts.

Thus, CC has held that Article 397, part 2, of the Code of Civil Procedure, which excludes the possibility of checking, by cassation (appeal), of the legality and validity of a trial court's ruling satisfying a request for review of a court act in connection with newly discovered facts and, consequently, for setting aside of such court act and which does not provide any adequate mechanism for correction of unlawful and unsubstantiated decisions, infringes upon citizens' constitutional right to protection by court and, as such, is declared unconstitutional.

The RF Constitutional Court has resolved that federal legislators should make relevant amendments to the provisions regulating the procedure for challenging the above-mentioned rulings of trial courts. Pending such amendment, common courts may not refuse to examine private complaints against such rulings in accordance with the cassation (appellate) procedure set forth by the RF Code of Civil Procedure.

**2.** On February 26, 2010 the RF Constitutional Court issued the Resolution "On the matter relating to checking of constitutionality of Article 392, part two, of the RF Code of Civil Procedure in connection with the complaints of A.A. Doroshka, A.E. Kot and E.Yu. Fedotova", No. 4-P. By this Resolution Article 392, part 2, of the RF Code of Civil Procedure has been held to be consistent with the Constitution of the Russian Federation. However, CC has pointed out that, in order to secure proper legal regulation, federal legislators should make appropriate amendments to the RF Code of Civil Procedure, following CC's legal position set forth in its Resolution.

Article 392, part 2, of the RF Code of Civil Procedure provides a list of the reasons for review of effective court acts. This list does not include one of the reasons such as a recognized by the European Court of Human Rights (ECHR) violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms during examination by a common court of a matter in respect of which the applicant applies to ECHR. CC has held that the non-inclusion of the said reason in Article 392, part 2 of the RF Code of Civil Procedure may not be regarded as permission for a common court to deny re-trial, in connection with newly discovered facts, of a matter in which ECHR has found a violation of the Convention. Not every decision of ECHR, by which the respondent Government is obligated to pay a monetary compensation, ensures thereby the full restoration of the applicant's infringed right. ECHR merely states the fact of a violation of the Convention. The respondent Government is obligated in such event to take measures ensuring the restoration of a citizen's infringed rights, in particular, by establishing of adequate opportunities for re-trial of matters within the legal system, including re-opening of proceedings in the judicial instances where the violation took place. Thus, CC has pointed out that a person, upon whose application the ECHR resolution was issued, should be afforded an opportunity to apply to a competent court with a request for review of court rulings issued in his matter and be sure that his request will be considered. Otherwise, everyone's right to protection by court would be diminished and limited.

CC has resolved that the constitutional legal meaning of Article 392, part 2, of the RF Code of Civil Procedure, as revealed by the Resolution, is obligatory for all and precludes any other interpretation thereof in law enforcement practice.

**3.** On March 17, 2010 the RF Constitutional Court issued the Resolution "On the matter relating to checking of constitutionality of Article 117, Article 292, part 4, Articles 295, 296, 299 and Article

310, part 2, of the RF Code of Arbitration Procedure in connection with the complaint of Dovod Closed Joint Stock Company”, No. 6-P.

CC has held that the above-mentioned provisions of the Code of Arbitration Procedure, relating to restoration of an expired time limit for challenging of court acts by way of supervision, are consistent with the Constitution of the Russian Federation. CC has pointed out that the legislation regulating restoration of a time limit for filing a request to review, by way of supervision, of an effective court act should ensure a proper balance between the principle of legal certainty and the right to fair trial. An expired time limit may be restored and, consequently, supervisory proceedings may be commenced only within a reasonably limited period and provided that there existed material objective circumstances which prevented the person seeking the restoration of such time limit from defending his rights at the appellate (cassation) instance) or within the general time period set for challenging by way of supervision. Thus, an expired time limit may only be restored if there are valid reasons supported by relevant evidence. The provisions of the Code of Arbitration Procedure imply that competent arbitration courts are required to assess the validity of arguments of a person seeking the restoration of an expired time limit and do not exclude the possibility of terminating the pending proceedings.

### **Lawmaking. Procedural Legislation**

On March 4, 2010 the Plenum of the RF Supreme Arbitration Court issued the Resolution “On Introduction to the State Duma of the RF Federal Assembly of the Draft Federal Law “On Amendment of the Code of Arbitration Procedure of the Russian Federation”. This bill has been prepared in accordance with the Resolution of the RF Constitutional Court of January 21, 2010, No. 1-P, which obligates legislators to make changes and additions to the arbitration procedural legislation that should affirm the possibility of review, in connection with newly discovered facts, of a court act based on a legal provision, the practice of application of which has been determined (changed) after coming in force of such act by a resolution issued by the Plenum of the RF Supreme Arbitration Court or the Presidium of the RF Supreme Arbitration after examination of another case by way of supervision. Legal positions developed by the RF Supreme Arbitration Court for the purpose of ensuring the uniform interpretation and application of legal provisions may serve the grounds for review, by way of supervision, of an effective court act. The bill proposes to modify the concept of review of a court act in connection with newly discovered facts, in particular, by distinguishing between “new” facts (circumstances occurring after issuance of a court act that are essential to proper resolution of the matter) and “newly discovered” facts (existing at the time of issuance of a court act).

### **Personal Data Protection**

On February 5, 2010 the Federal Service for Technical and Export Control issued the Order “On Approval of the Regulations of Methods and Ways of Protection of Information in Information Systems of Personal Data”, No. 58.

The Regulations determine the methods and ways of protection of information that may be used to secure the confidentiality of personal data during processing thereof in information systems of personal data, including but not limited to: methods and ways of protection of information against unauthorized access which may result, in particular, destruction, alteration, blocking, copying, distribution of personal data, as well as methods of protection of information against leaks through technical channels. An organization having a license to carry on activities relating to technological protection of confidential information may be retained to choose and implement methods and ways of protection of information. The choice and implementation of methods and ways of protection of information are dependent on personal data security threats (threat models) and the class of information systems. The Regulations specify the particular methods of protection of information against unauthorized access and against leaks through technological channels. The Regulations do not apply to personal data that constitute state secret as well as to cryptographic methods and ways of protection of information.

## Securities Market

1. On January 26, 2010 the Federal Service for Financial Markets issued the Order "On Amendment of Some Orders of the federal Services for Financial Markets", No. 10-3/pz-n, by which the procedure for licensing of professional activities in the securities market has been revised.

The Order has repealed the provision allowing the applicant for a license to submit documents to one of self-governing organizations for obtainment of a request for issuance of the license. The license requirement concerning job experience of the applicant's single-member executive body in certain job positions has been changed. Now the required minimum period is two years (one-year experience was sufficient earlier) and the list of organizations experience with which is relevant for the purpose of meeting the said requirement has been expanded. The Order determines the procedure to be followed by the licensee in the event of suspension or early termination of power of its single-member executive body.

Certain provisions governing the procedures for examination, issuance, denial or renewal of a license have been repealed. It is established that the licensee must discontinue respective professional activities in the securities market as of the effective date of a relevant resolution to suspend or cancel the license (previously – as of the date of receipt of a relevant notice). Within 5 business days from the effective date of a resolution cancelling the license, the licensee must surrender the cancelled license form to the licensing authority. If such form is not surrendered within the said period, the licensing authority must within 60 days from the date of the resolution cancelling the license submit relevant information to law enforcement authorities. The Order has also made changes to regulation of activities in connection with organization of sale in the securities market, as far as the timelines for submission of information on entry into transactions is concerned.

2. On February 9, 2010 the Federal Service for Financial Markets issued the Order "On Approval of the List of foreign organizations keeping record of securities rights, with which Russian depositaries may open an account of a person acting for the benefit of other persons, for keeping record of rights to foreign issuers' securities admitted to public offering and/or public circulation in the Russian Federation", No. 10-6/pz-n. The List includes over 60 foreign organizations with indication of their names in Russian and in English.

## Commodities Exchanges

On March 4, 2010 the RF Government issued the Resolution "On Approval of the Regulations of licensing of commodities exchanges in the territory of the Russian Federation", No. 121, which determines the procedures for issuance, cancellation and suspension of a license to organize drafting on the exchange.

The Regulations establish the list of license requirements and terms, application form to be submitted by the applicant, timelines for making a decision on issuance and timelines for issuance of a license, reasons for denial of a license and the procedure for repeated examination of documents and renewal of a license. The Regulations also determine the grounds and procedure for issuance of decisions on cancellation, suspension or resumption of a license. Each year a commodities exchange must submit by April 1 to an authorized government body a certified copy of an auditor's report and a calculation of its own assets as of the last reporting date.

On March 2, 2010 the RF Government issued the Resolution "On Approval of the Regulations of licensing of activities of exchange intermediaries and exchange brokers entering into exchange trade contracts being derivative financial instruments, the underlying asset of which is exchange commodity", No. 111.

The Regulations determine the terms and procedures for issuance, renewal, suspension or cancellation of licenses authorizing exchange intermediaries or brokers to enter into relevant contracts. It is established that a license is issued without limitation of validity period. The Regulations set forth the license requirements and terms, lists of documents to be submitted by

applicants, timelines for making a decision to grant or deny a license, and the list of reasons for such denial. The Regulations provide for the right to challenge such denial in court. An authorized government body maintains the register of issued, registered, suspended and cancelled licenses. The Regulations set forth the reasons and procedure for renewal of licenses.

### Refinancing Rate

According to the information of the Central Bank of Russia as of March 26, 2010, the updated refinancing rate of the Bank of Russia effective from March 29, 2010 is 8.25 % per annum. The previous rate effective from February 24, 2010 was 8.5% per annum. Therefore, interest rates for operations effected by the Bank of Russia have been revised accordingly.

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This newsletter is not intended to provide legal advice and/or any other form of legal assistance that may be rendered by attorney-at-law to client. The exclusive purpose of this review is to make aware its recipient of certain recent changes in Russian laws and regulations, and of the development of law application practice. Any use of the information contained herein for particular purposes may require more detailed case-specific explanations. Further information can be obtained via +7 (495) 933 75 67 or [office@agp.ru](mailto:office@agp.ru)

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