

Contracts, negotiation and enforcement in the Russian Federation: overview

Daria Ilyina
Egorov, Puginsky, Afanasiev and Partners Law Offices

global.practicallaw.com/8-638-4762

FORMATION OF CONTRACTS

Authority and capacity

1. What are the authority/capacity rules for entering contracts, for different commercial entities?

Russian legal entities are divided into:

- Commercial organisations (for example limited liability companies, joint stock companies, partnerships and so on).
- Non-commercial organisations (these entities do not distribute their profits among their founders/members and include foundations and associations).

Most commercial organisations can carry on any business activity and enter into any contract. However, non-commercial organisations and some commercial organisations (for example, insurance companies, credit organisations, investment funds, state and municipal unitary enterprises and so on) can only enter into contracts which serve to achieve the objects set out in their charter.

For some activities organisations may require specific permits, licences or membership in a self-regulated organisation (for example, construction, valuations, auditing and some other activities must be conducted only by members of self-regulated organisations (that is, non-commercial organisations that unite professionals or the commercial entities carrying out certain types of activities)).

The legal capacity of Russian organisations may be limited in insolvency proceedings, for example:

- Certain of the debtor organisation's transactions may be held void (for example, if they are deals to the detriment of the creditors and contracts for unfair consideration and so on).
- Its financial (business) plans require the approval of the company's creditors.
- In certain insolvency proceedings, the powers of all governing bodies are terminated and a special manager (liquidator) approved by the court takes decisions and acts on the company's behalf.

The authority for entering into transactions on behalf of foreign entities is generally governed by the law of the place of their incorporation.

Formal legal requirements

2. What are the essential requirements to create a legally enforceable contract?

A contract must contain all material provisions and must be concluded in the form specified (see *Question 3*).

The material provisions are both:

- The subject matter of the contract. This is the core obligation under the contract (for example, the subject matter in a sale and purchase agreement is the obligations to transfer the title to an object and to pay for it).
- Other provisions, if they are set as material in the legal rules for a specific type of contract, or if the parties so agree. For example, generally in a sale and purchase agreement only the subject matter and the object of the agreement are material under the law. However, in wholesale and retail sale and purchase agreements, and agreements in relation to immovable property, a clause including the purchase price is also additionally required.

For the requirements on the contract form, see *see Question 3*.

3. What are the main forms of contract?

The offer to enter into a contract must expressly state that it is the intention of the offeror that the contract is concluded if the offeree accepts the offer. The offer must also contain all the material provisions of the contract.

By default, the offer cannot be withdrawn, unless the possibility of withdrawal is specified or implied in the offer.

If a notice withdrawing an offer is delivered before or simultaneously with the offer, the offer is regarded as non-received.

Advertisements and other offers addressed to the public are deemed to be invitations to make offers, unless otherwise is set out in these documents. If the offer contains all material terms of the contract and includes the intention of the offeror to conclude the contract on the specified terms with any person who will accept the offer, this offer is recognised as a public offer (the offeror under a public offer cannot refuse to enter into the agreement with any person accepting the offer).

Written form

Contracts between legal entities, legal entities and individuals, and contracts between individuals for amounts exceeding RUB10,000, must be made in written form.

To be in a valid written form, the contract must be concluded by either:

- The execution of a single document.
- Exchange of letters, telegrams, telex, telefax, or electronic documents delivered by communication facilities, which evidence the fact that the documents were sent by the party to a contract.

It is recommended that contracts be executed by including a right for the counterparties to conclude further contracts in electronic form. This is done by the parties signing the contract by hand, which specifies the e-mail addresses and parties' representatives authorised to execute and deliver the e-mails.

In specific cases (under the law or by the parties' agreement) a contract must be executed in a single document only (for example, contracts on transfers of shares in limited liability companies, and shareholders' agreements).

Oral form

Contracts between individuals for RUB10,000 and less can be effected orally (unless the law provides for the mandatory written form). The oral form of contract is also allowed for contracts that are performed at the moment of their execution (unless otherwise provided under the law) (for example, the sale and purchase agreement of a movable asset based on delivery-versus-payment basis, excluding movables, the transfer of which requires registration (for example shares and participatory interests)). Transactions effected for the execution of a contract, which was concluded in written form, can be effected orally by the parties' agreement (unless this is contrary to the law).

Notarisation

Certification by a notary is required either:

- In cases specified in law (for example, for the transfer of shares in a limited liability company, a mortgage agreement, a marriage agreement and so on).
- If the parties agree to certify the contract.

There are no private notaries in Russia; all notaries are public. When certifying the transaction, notaries check:

- That each party has the right (title) to enter into the contract.
- Fulfilment of any mandatory procedures (for example, pre-emption rights, corporate approvals and so on).
- The powers of the parties' representatives to enter in the transaction.
- The compliance of the agreement with mandatory legal rules.

The terms of the contract can be defined in the contract or incorporated by reference to another document.

4. How are preliminary agreements used in your jurisdiction?

Heads of terms, memoranda of association and so on are quite frequently used in business practice, particularly in complex transactions for pre-contractual review, and usually contain the general terms of the main transaction. Most provisions of these documents are not legally binding (except for some specific clauses such as confidentiality, dispute resolution and so on).

The concept of the "preliminary agreement" also exists in the Russian Civil Code. This is an agreement in which the parties undertake to enter into a future agreement on the conditions set out in the preliminary agreement.

The preliminary agreement must be made in the same form as the main agreement and contain the subject matter of the main contract and all the provisions that must be agreed in the main contract. If no term for entering into the main contract is specified in the preliminary agreement, it must be concluded within a year from the date of the preliminary agreement. If one of the parties avoids execution of the main contract, the other party can claim the execution of the main contract in court within six months from the non-performance of the obligation to enter into a contract. In this event, the conditions of the main contract are deemed concluded from the effective date of judgment.

5. Can negotiations become legally binding in any circumstances? What are the principles and rules (if any) on pre-contractual liability and good faith in negotiations?

In June 2015 the rules for the conduct of negotiations to conclude a contract were introduced into the Russian Civil Code. Since then the general duty of persons entering into contractual negotiations to act in good faith has been expressly stated in law.

The concept of bad faith is defined as the situation where one party to negotiations either:

- Provides the other party with incomplete information.
- Conceals certain facts.
- Unexpectedly breaks off the negotiations without due cause.

For breach of pre-contractual mandatory obligations, the party in breach must reimburse the other party's losses, for example:

- Expenses incurred when conducting negotiations.
- Expenses related to the lost opportunity to conclude a contract with a third party.
- Expenses incurred as the result of disclosure or use of the other party's confidential information.

The obligation to negotiate in good faith cannot be limited by the parties.

Parties can also enter into an agreement that establishes the rules for conducting negotiations. Legally binding agreements of this kind are not widely used in Russia.

Formalities for execution

6. When are written contracts required and for which assets/interests?

Generally, contracts between commercial entities are concluded in simple written form (that is, in a form of a written document signed by the parties), unless a notarisation requirement is legally required or agreed by the parties.

For the cases where oral contracts or the electronic form are allowed, see *see Question 3*.

For some contracts registration in specific registers is also required (for the details, see *Question 7*).

7. Are there different formalities for different types of contractual document?

Written contracts in Russia are concluded either in a simple form (in a form of written document(s)) or in a form of a written notarised contract (*Question 3*). Notarisation of contracts is mandatory for specific types of contract (*see Question 13*). The parties can, at their discretion, also agree to notarise contracts (even if notarisation is not mandatory under the law).

Some contracts (or rights under contracts) also require registration with the relevant authorities. For example:

- Long-term leases of immovable property for a term exceeding one year and mortgages must be registered with the Russian Federal Service of State Registration, Land Register and Cartography.
- Transfers of shares in a limited liability company must be notarised and registered with the Russian Federal Tax Service.

- Transfers of shares in a joint stock company must be registered in the register of shareholders (maintained by special companies with a licence to provide registration services).
- Information on pledges of movable property must be notified to any notary public who then includes this information in the unified register of movable property pledges.
- Transfers of the rights in trade marks must be registered by the relevant Russian authority (*Rospatent*).

There are no specific types of contractual documents in Russia similar to deeds.

No type of contract requires witnesses.

8. What are the formalities for the execution of documents by companies, foreign companies and individuals?

Companies

The signature of an authorised person is required to execute company documents (the authority may follow from the position of CEO or from a power of attorney). If a company has its own seal, it must be affixed to the document.

Until recently it was mandatory for each company to have a round seal containing the full company name in Russian and some other details. This rule has now been amended: companies may continue to use their seals in their operations, but the seal is no longer mandatory. However, almost all Russian companies traditionally use seal in their activities.

Foreign companies

The procedure to execute contracts by foreign companies is predominantly governed by the law of the company's place of incorporation. Generally, the signature of an authorised person is required (the authority must also be checked in accordance with the law of the company's place of incorporation).

Individuals

A mere signature is required for individuals to execute contracts.

9. What is the status of electronic and faxed signatures in your jurisdiction?

Counterparties can use faxed signatures (or similar methods) in the course of their dealings if it is expressly agreed between them. It is generally accepted that an agreement containing a provision allowing faxed signatures or exchanges of electronic documents between the parties must be executed in handwriting (otherwise it may be difficult to prove whether the authorised representatives of the parties executed the initial agreement).

The use of special electronic digital signatures (EDSs) is also possible if the parties agree on its use in their dealings. The procedure for obtaining EDSs from certification centres and using EDSs, and obtaining and using special encrypting key codes provided by certification centres is governed by the special Law on EDS.

Deeds

10. When are deeds required in relation to contracts?

This is not applicable. Contracts in Russia are concluded either in simple written form (a document executed by the parties) or in the form of a notarised contract (under the law or if parties so agree). For some specific cases registration of a contract or of a right under

the contract with the relevant authorities is required (see *Question 7*).

11. What are the legal formalities for a deed?

Not applicable (see *Question 10*).

12. What are the legal requirements for the execution of deeds?

Not applicable (see *Question 10*).

Notarisation

13. Is notarisation required for contracts in your jurisdiction?

Notarisation is required in cases specified in the law (for example, for the transfer of shares in a limited liability company, mortgage agreements, marriage agreements and so on) or if the parties agree to certify the contract. (See also *Question 3*.)

14. What are the legalisation requirements in your jurisdiction and how is it carried out?

Russia is a party to the HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (Hague Apostille Convention). Therefore, the apostille on public documents executed in foreign countries which are also signatories to the Hague Apostille Convention is accepted by Russian state authorities. Foreign documents together with the apostille stamp must be translated into Russian and the signature of the interpreter must be notarised (the notary checks whether the interpreter has the relevant interpreter's diploma).

If Russian public documents are provided in a foreign country's territory, a party must either apply to:

- The Ministry of Justice to receive a Hague Apostille Convention apostille for convention signatories.
- If legalisation is required, the Ministry of Justice certifies the signature on the documents (generally, the signature of notary public, because most documents are legalised in copies certified by the notary). Then application is made to the Ministry of Foreign Affairs and to the relevant consular department of the foreign country.

Generally, it takes three business days to apostille or legalise the document in the Russian Federation.

Powers of attorney

15. What are the main types of powers of attorney in your jurisdiction?

A power of attorney is a written authorisation document granted by one person to another for the purposes of representing the former before third parties. Generally, there are no specific types of power of attorney.

Typically, powers of attorney can be revoked at any time except for special irrevocable powers of attorney (introduced recently). Special irrevocable powers of attorney can only be used in dealings between commercial entities for the purpose of securing obligations (for example, to secure voting rights provided by one shareholder to another, the first shareholder issues the power of attorney on voting to another shareholder). The main difference

between irrevocable and revocable powers of attorney is that under the revocable power of attorney the attorney acts in the interests of the person who granted the power of attorney, while under the revocable power of attorney the attorney acts in its own interest or in a third party's interests.

16. What are the main transactions when powers of attorney are used?

In relations with third parties (including when entering into any agreements):

- A company can be represented either by its CEO (acting without power of attorney) or by any other person authorised by a power of attorney issued by the company's CEO.
- Individuals either act themselves or are represented by another person authorised by a power of attorney.

Under some contracts, a power of attorney must be provided by one party to another for performance of the contract (for example, agency contracts, some services agreements and so on).

17. What are the key provisions in a power of attorney?

The following must be specified in a power of attorney:

- The identity of the person granting the authority and the power of attorney.
- The date of issue of the power of attorney.

If the term is not specified in the power of attorney it is deemed to be granted for one year (unless it is notarised and granted to represent a person in a foreign territory, in which case its term is deemed unlimited and it is valid until its revocation).

18. What are the formalities for the execution of a power of attorney?

Powers of attorney to enter into transactions that are subject to notarisation must be certified by notary (*see also Question 3*).

The power of attorney must also be notarised if it is granted for registering rights and transactions in the state registers (*see also Question 7*).

The powers may be contained in either:

- A separate power of attorney document.
- The contract.
- The company's corporate resolution.

However, the most frequently used document is a separate power of attorney.

Other

19. Is virtual closing used in your jurisdiction?

Virtual closing is used in the Russian Federation.

However, some contracts expressly specified in law must be executed in a single document (for example, shareholders' agreements, agreements on the sale and purchase of shares in a limited liability company, and so on); other agreements can be executed by the parties signing separate signature pages.

All agreements can be signed in any number of counterparts.

20. How are legal opinions obtained and used in your jurisdiction?

Generally, legal opinions (including due diligence reports and legal opinions on specific issues of Russian or foreign law) are used in business practice to confirm certain points or legally qualify certain facts.

The granting of legal opinions is not expressly regulated in law. Generally, either party applies (or both parties apply) to a lawyer or (more often) a law firm to obtain a legal opinion. The party then enters into a legal services agreement and receives a legal opinion as a result.

Legal opinions on Russian law are not used in courts because the judge must independently interpret the rules of law applicable to the dispute.

However, if a consideration of foreign legal rules is required to resolve a dispute, the parties can provide the relevant legal opinions to the court.

21. What are the key issues in the conduct of completion meetings?

Completion

Completion can take place on the date of signing, or later, on the agreed date and in the agreed place (especially in complex transactions).

It is recommended to undertake all the following before the completion meeting:

- Agree the list of documents to be provided on completion.
- Agree the drafts of all the documents to be executed on completion.
- Prepare all relevant registration forms, transfer orders, corporate approvals, any clearance with governing authorities (if applicable) and so on.
- Check the relevant documents (powers of attorney, constituent documents of the counterparty).

The completion procedure depends on:

- The type of contract.
- The contract's form (simple written or notarised form (*see Question 3*)).
- The agreed structure of the contract's performance and the method of payments chosen by the parties.

In addition to standard methods of payment (wire transfers to bank accounts, letters of credit and so on), settlements by escrow were recently introduced in the Civil Code (*Articles 860.7 to 860.10, Civil Code*). However, this method of settlement can only be currently used to transfer money. The escrow account is opened with a bank that holds and blocks the funds to a third party (beneficiary) and releases the funds on the occurrence of specified events.

Conditions precedent/conditions subsequent

Conditions precedent are quite frequently used in contracts (especially in complex business transactions). Conditions subsequent are also permitted in agreements (which means that the agreement must be terminated if these conditions are met).

Up until recent changes to the Civil Code (*Article 327.1, Civil Code*), there was a trend in Russian case law to consider invalid most "potestative" conditions (that is, conditions, the occurrence of which depend solely or mainly on the will of one of the contractual parties). It is now expressly stated in the Civil Code that the performance of obligations and execution, change or termination of rights under the contract can be dependent on the specific actions of one of the parties to contract or on the events (specified in the contract), including events the occurrence of which depends solely on the will of one of the contractual parties (for example, option agreements which can be exercised by the optionholders solely at their own discretion within a specific term).

CONTENT OF CONTRACTS

22. What is the legal status of contractual terms in your jurisdiction?

Part 2 of the Civil Code provides for some default rules which apply unless the parties expressly agree otherwise. These terms can be considered to be implied terms as they are not expressly set out in the contract, but apply to the relations of the parties. For example, the Civil Code provides for:

- Standard situations where the lease contract may be terminated by one of the parties and the pre-emption right of the tenant to conclude a lease for a new term.
- Standard rules applied if the sold object under the sale and purchase agreement is of poor quality (for example, the right to an exchange, the right to demand the adjustment of price or to terminate the contract if the defects are material and so on).

Contractual terms (depending on their content) give rise to different legal consequences. They can:

- Set the obligations and/or rights of the parties.
- Provide for the conditions under which these rights and obligations arise.
- Specify information on the parties and sometimes the reasons for entering into the agreements and other relevant information.
- Provide for remedies.

Therefore, the contract can contain conditions, obligations, terms of declarative character (information and the parties' intentions), representations, remedies and so on. However, these terms are generally not sorted into types, as all of them are considered to be the contractual provisions agreed by the parties.

23. Are warranties recognised in your jurisdiction?

In previous business practice, parties used concepts with legal consequences almost similar to representations, for example:

- Setting requirements to the quality of goods in sale and purchase agreements.
- Using the concept of "misleading a counterparty" and granting the right to challenge the contract.
- Using the concept of "material change of circumstance" and granting the right to claim unilateral termination of contract, if a party becomes aware that certain information provided by another is not true.

Since June 2015, the concept of "representations" has been expressly set out in the Civil Code (*Article 431.2*). In the event of a misrepresentation, the breaching party must reimburse the other party for any losses incurred or pay damages as set out in the

contract. The other party is also entitled to terminate the contract (unless the contract states otherwise).

Representations can only be used in:

- Business contracts (concluded in the course of business operations).
- Shareholders' agreements.
- The sale and purchase of shares.

The invalidity of the contract does not affect the validity of representations. Russian law does not distinguish representations from warranties; the term "representations" constitutes a combination of the English terms of representations and warranties in one concept.

VARIATION AND ASSIGNMENT

24. What are the main ways to transfer contractual rights?

The main way to transfer the contractual rights is to assign them.

If the transfer of obligations is also required, the concept of "transfer of debt" is used. The rights can be assigned without the debtor's consent (unless the contract or law sets out otherwise), but the debtor must be notified of the assignment. The assignment of rights indissolubly related to the creditor (for example, claims for personal injuries, claims for alimony payments and so on) is prohibited.

Some rights are assigned by law (pledge, for example, where the assignment of a main obligation under the contract leads to the assignments of all securing rights attached to the main obligation).

Subcontracting is allowed (unless the contract or law stipulates that the obligations must be performed by the contractor). Subcontracting does not transfer the contractual rights, but the obligations are performed by a third party (the subcontractor). The contractor remains liable to both:

- The customer (the client) for non-performance by the subcontractor.
- The subcontractor for non-performance by the customer.

Unless the contract or law stipulates otherwise, the subcontractor and the customer are not entitled to make any claims against each other.

Novation does not lead to the assignment of contractual rights. Under Russian law, novation means the termination of a contract between the parties by change of one obligation for another obligation between the same parties.

25. What are the rules relating to waiver of contractual rights?

Under the general rule in the Civil Code (since its adoption), the waiver of rights does not terminate them, unless otherwise provided by law. The new Article (*Article 450.1*), introduced in June 2015, expressly provides an exception from the above rule and distinguishes the waiver of the right to repudiate a contract and the waiver of other contractual rights.

If grounds for a party to exercise its right to repudiation arise, and this party nonetheless confirms the validity of the contract by its actions or inaction, the right to repudiation based on these grounds is considered terminated and cannot be exercised later.

Waiver of other contractual rights is expressly allowed only in relations between business entities. The waiver of rights or the failure to exercise them at term prevents the exercise of these

rights by the waiving party in future, except for cases when the same grounds give rise to these rights again.

ENFORCEMENT

Liability and remedies

26. What are the rules relating to invalidity, misrepresentation and mistake relating to contracts?

Invalidity

Invalid contracts are divided into null (invalid independently of the fact whether the court decision on its invalidity is held) and void (invalid if the so court rules) contracts.

The legal consequences of invalidity of the contract depend on the grounds for invalidity: generally each party must return everything received under the contract to another party. In some cases the defaulting party must reimburse losses incurred by another party (for example, in cases of fraud); in some cases gains received under the contract may be collected by the state (for example, if the contract contradicts public order) and so on.

Mistake

An agreement concluded by one of the parties due to mistake can be held void. The mistake must be so material that if the party had been aware of the actual facts, the party acting reasonably would not have concluded the transaction (the law stipulates certain criteria where the mistake may be considered material).

Misrepresentation

In the case of misrepresentation (where one party deliberately withholds important facts, which ought to have been provided with due care to another party in the ordinary course of business), the non-defaulting party can challenge the transaction. If the misrepresentation was done by a third party, the contract can only be challenged if another party knew or ought to have known about the misrepresentation (*Article 179, Civil Code*).

In the past, there was a negative trend of challenging transactions in court for any reason (while the actual reason was that one of the parties was no longer interested in the transaction), which led to unpredictable and unstable business relations. The courts have attempted to distinguish and dismiss the cases where the challenging party acted in bad faith and most of the approaches formed in case law were set out in the Civil Code within the recent reform.

27. What are the main performance and discharge rules relating to contracts?

Generally the contract is discharged if (*Articles 408 to 419, Civil Code*):

- It is duly performed.
- The parties agree on compensation (money or assets) instead of performance under the agreement.
- There is a set-off, unless the set-off is prohibited under the law or in the contract.
- One person is a debtor and a creditor under the contract (as the result of deal (for example, in the purchase of the asset leased by the purchaser and the lease agreement terminates) or mergers and so on).
- The parties agree to terminate the contract.
- There is judicial or extrajudicial termination of the agreement (*see also Question 3*).

- Performance under the contract is not possible and none of the parties are at fault.
- There is dissolution of a legal entity or death of an individual who are parties to contract.

No party is responsible if non-performance of the contract is caused by force majeure event (extreme and unpreventable circumstances). The parties can agree in the contract the legal consequences of long-term force majeure events (for example, amendment or termination of contract).

28. What are the key rules on privity of contract and third party rights?

The contract can provide for the rights (but not the obligations) of third parties to the contract by expressly stating that the contract is in favour of the third person (*Article 430, Civil Code*). When the third party expresses its intention to execute its rights under the contract, the parties must not terminate or amend the contract without the third party's consent (unless the contract or law stipulates otherwise). The debtor under the contract can raise the same objections against the claims of a third party as it could have raised against the creditor. Unless contrary to the law, if a third party withdraws from the execution of its right under the contract, the creditor can execute it.

29. What are the main rules relating to contractual liability?

Breaches of different types of contractual term do not give rise to different rights to enforce, as this depends on the content of the term (*see Question 22*).

For the main remedies available in case of breach of the contract, *see Question 32*.

In contractual obligations with multiple debtors who are jointly and severally liable, the creditor is entitled to file a claim against all of the debtors at once or choose any of them. Unless otherwise agreed between the debtors the debtor who performed the obligations to the creditor has recourse against all other debtors for the amount performed (less part of the debt attributed to this debtor).

30. What are the main rules relating to excluding contractual liability?

Generally, in a breach of contract the breaching party is held liable if it is at fault (including both wilful intent and negligence), unless the law or the contract provides for the other grounds for responsibility. Unless the contract or law prescribes otherwise, parties to business contracts (that is, contracts concluded within the course of business activities) are liable, unless the party proves that non-performance of the contract was caused by force majeure event.

Agreements to limit the liability for deliberate breaches of contract are null (*see Question 26*). It is possible to limit the amount of losses (to the actual amount lost or less). A remedy similar to English liquidated damages can be set under Russian law only in a form of punitive penalty (the party is entitled to claim losses plus penalty). However, this penalty can be reduced by the court if it significantly exceeds the amount of actual losses.

31. What are the main contractual remedies?

For breaches of contract, the following main remedies are generally available for the non-breaching party.

Claim for losses (damages) or penalty

Losses are defined as both (*Article 15(2), Civil Code*):

- The expenses the non-breaching party has incurred or will have to incur to restore the breached right, the losses or the damage done to his property (the compensatory damage).
- The profits the non-breaching party would have received under ordinary conditions, if his rights had not been violated (the missed profit).

To claim for damages, the non-breaching party must prove the fact and amount of losses and that the losses were caused solely by the breach of the contract (this is difficult to prove). If losses were caused partially by the breach of contract and partially by some other reason (not connected with the breach), the non-breaching party should receive the reduced damages caused only by the breach. If the party fails to prove the exact amount of losses, but proves the fact that the losses were incurred, the court must reasonably define the amount of losses by itself (*Article 393(5), Civil Code*).

If the contract provides for the specific penalty for breach of the contract, the non-breaching party can claim the penalty (*Article 394, Civil Code*). The penalty may be either:

- Exclusive (that is, only the penalty and not actual losses may be claimed).
- Alternative (that is, the party can claim either losses or the penalty).
- Punitive (the party is entitled to claim losses plus penalty).

The judge can reduce the penalty at a party's request if it significantly exceeds the amount of actually sustained losses (*Article 333, Civil Code*).

Claim for specific performance

A claim for specific performance is one of the possible kinds of remedy (*Article 12, Civil Code*). If the debtor does not perform its obligation, the creditor can claim specific performance of the obligation (*Article 308.3, Civil Code*).

Although Article 308.3 of the Civil Code was introduced relatively recently, the case law based on Article 12 of the Civil Code generally recognised this kind of claim.

The court can set a monetary penalty (similar to the *astreinte* in France (that is a monetary penalty for the period of delay for non-performance of a court decision) for non-performance of a judgment for specific performance of the obligation. However, the actual enforcement of a judgment for specific performance is complicated, because it is unclear what kind of actions an enforcement officer can take (except for recovery of a court penalty for non-performance of the judgement).

Claim for debt payment and interest accrued for the period of delay

A party to a contract can claim the payment of outstanding debt in court.

If the contract does not provide for the penalty for delay in payment, the creditor can also claim interest for the period the outstanding debt occurred due to delay in payment (the rate is equal to key rate of the Bank of Russia (10.5% since July 2016)) (*Article 395, Civil Code*).

Claim for termination of the contract

The contract can be terminated by the court at the non-breaching party's request if there is a material breach of contract and in some other cases specified in law. The contract may be unilaterally and extrajudicially terminated with a written notice of termination in cases (connected or not connected with the breach of contract) expressly set out in law or contract (*Article 450 and Article 450.1, Civil Code*).

The right to withhold performance under the contract

If a party to a contract fails to discharge its obligations (or if there are circumstances obviously testifying to the fact that the discharge will not be effected within the fixed term), another party (onto which the recourse discharge is imposed) has the right to suspend the discharge of its obligation or to refuse to discharge this obligation, and to claim the compensation of the losses (*Article 328(2), Civil Code*).

Pre-trial mandatory procedure of dispute resolution

Following recent amendments to the Arbitrazh Procedure Code (*Article 4(5)*), a pre-trial procedure of dispute resolution is mandatory for most disputes (except for some specific disputes, including insolvency procedures, corporate disputes, the challenge of arbitral awards, the protection of rights of a group of persons, early termination of a brand due to inactivity, and so on). The pre-trial procedure means that the non-breaching party can file a claim against the breaching party with the court after it sends a claim to the breaching party and waits for its response for 30 calendar days (unless other terms or procedural rules are set out in the contract).

Injunctive measures

If it is obvious that without the injunctive measures the performance of the judgment will be complicated or impossible, the claimant can request the court to order injunctive measures (for example, freezing accounts, prohibitions on making any or specific entries into the state registers and so on).

Unclear or controversial contractual provisions are

Generally, the court interprets contractual provisions on the basis of their literal meaning. However, if the literal meaning is vague, the court must identify the will of the parties by comparing the vague term with other terms of the contract. If this does not help to identify the common will of the parties, the court must consider all relevant evidence, including (*Article 431, Civil Code*):

- The negotiations and the correspondence preceding the conclusion of the contract.
- The habitual practices in the relationships between the parties.
- The customs of the business sector.
- The subsequent behaviour of the parties.

However, in practice, courts rarely interfere into the parties' relationship and prefer to consider the vague term as not agreed by the parties.

32. What are the main differences between indemnity and damages? Are penalty clauses subject to any limitation?

The main difference between damages and indemnity is that an indemnity is not a charge of liability, but an obligation to reimburse the losses. This means that proof of the debtor's guilt or the wrongfulness of its actions is not required.

Damages

In claims for damages, the following must generally be proved:

- The debtor's guilt.
- The fact and amount of losses.

-
- The fact that losses incurred due to the debtor's wrongful actions (this is particularly difficult to prove).

The amount of damages may be reduced by the court in certain cases (where the amount of damages claimed significantly exceeds the amount of actual losses).

Indemnity

Indemnities can only be set in contracts between commercial counterparties and individual businessmen. Individuals without the status of individual businessman can only use an indemnity in shareholders' agreements or agreements for the disposal of shares/participation interests. To obtain a status of individual businessman a person must apply to the Russian tax authority for the registration which must be done within three business days from the date of application. The specific requirements are set out in the law On Registration of Individual Businessmen and Legal Entities. Generally an individual must provide information on:

- Passport data.
- Confirmation of the place of residence.
- Confirmation from the relevant authorities that they have no records of conviction (which is important if the individual plans to carry out specific activities, for example. medical practice, education, children's camps and so on).

An indemnity must not be reduced except for the cases where the amount of losses increased due to deliberate actions of the indemnified party.

Notably, the indemnity as a concept was introduced into Russian civil law in June 2015. There is little case law on enforcing indemnities in Russia compared with the case law on damages.

ENFORCEMENT AND CROSS-BORDER ISSUES

Choice of law

33. Is a foreign choice of law in a contract upheld by the local courts?

Generally, parties can choose a foreign governing law under Russian law (*Article 1210, Civil Code*).

Until recently in major complex deals (related to assets located in Russia) counterparties preferred a foreign (often English) governing law instead of Russian law due to both:

- The uncertainty and unpredictability of case law in Russia.
- The lack of legal instruments widely used in international contracts (for example, indemnities, warranties, escrow settlements and so on).

However, during the last five years there has been a developing trend toward the use of Russian law, especially in transactions involving Russian state-owned companies. This trend is supported through both:

- The set of "deoffshorisation" rules aimed at restricting the use of offshore companies (often used in domestic deals to avoid Russian governing law).
- Major civil law reform within the past three to five years (within which the legal concepts widely used in international contract practice were introduced (for example, indemnities, irrevocable powers of attorney, warranties and so on)). The reform is not yet completed and the revision of the rules governing specific types of contract is anticipated.

Choice of foreign law is generally upheld by the Russian local courts. However, there are some restrictions. If the relations under the contract are materially connected with one country, the choice of law must not contradict the mandatory rules of that country (*Article 1210(5), Civil Code*). In addition, there are some mandatory

rules of Russian legislation (of "direct applicability") that apply independently of the choice of law (*Article 1192, Civil Code*). For example, the special restrictions preventing foreign investors from gaining control over certain strategic assets in Russia without the approval of the relevant authorities is a mandatory rule of direct applicability (*Federal Law on the Procedure of Foreign Investment in Companies of Strategic Importance for National Defence Support and State Security No. 57-FZ*).

Foreign legal rules must not apply if they apparently contradict Russian "public order".

Some specific contracts can only be governed by Russian law (for example, contracts related to the real property located the Russian Federation (*Article 1213, Civil Code*)).

34. Are any mandatory terms implied by statute?

Rules governing specific key types of contracts (for example, sale and purchases, leases, services agreements and so on) are set out in Part 2 of Russian Civil Code. Part 2 sets out some default rules which apply unless the parties directly agreed otherwise.

Some rules set out in international conventions may also apply to contracts between Russian and foreign companies, unless the parties expressly exclude their application (for instance, the UN Convention on Contracts for the International Sale of Goods 1980).

Jurisdiction

35. Is a choice of jurisdiction in a contract upheld by the local courts?

Choice of foreign jurisdiction is generally allowed for contracts with an "international component" (for example, contracts between Russian and foreign companies, contracts related to property located outside of Russian territory and so on).

However, there are some specific restrictions. The Russian courts have exclusive competence in relation to the following disputes concerning (*Article 248, Arbitrazh Procedure Code*):

- Russian-state owned property, including disputes involving the privatisation of state property and the forcible alienation of the property for state needs.
- Real property located in Russia.
- Intellectual property registration (patents, certificates on trade marks, industrial samples and useful models, and so on).
- Invalid entries in state registers.
- Incorporation, liquidation or registration in the Russian Federation of legal entities or of individual businessmen, as well as challenging the resolutions of governing bodies of these legal entities.
- Administrative or other public legal relations.

Enforcement of foreign judgments

36. When are foreign judgments recognised in your jurisdiction?

For the enforcement of foreign judgments and foreign arbitral awards a writ of recognition issued by the Russian court is required (state arbitrazh courts are competent to issue writs of recognition for judgments on disputes arising out of the contracts between the companies).

In fact it is generally easier to enforce foreign arbitral awards in Russian courts than foreign judgments as the Russian Federation is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Although it is not expressly set out in Russian law, for the enforcement of judgments of foreign state courts parties may be required to prove that the judgments of Russian state courts are also recognised in the foreign jurisdiction in which the judgment was given.

The court will refuse to issue a writ of recognition (*Article 244, Arbitrazh Procedure Code*), in any of the following cases:

- The judgment is deemed ineffective under the law of the place of jurisdiction.
- The party against which the judgment is held has not been timely and properly notified about the time and place of trial or could not have given its explanations to the court for some other reasons.
- The dispute falls within the exclusive competence of the Russian courts in conformity with an international treaty of the Russian Federation or a federal law.
- There exists an enforced judgment of a Russian court on the same dispute.
- The same dispute is already under consideration of a Russian court and the legal proceedings in Russia were initiated before initiation of a procedure in a foreign court or the Russian court was the first to accept an application on the same dispute.
- The term of limitation for the enforcement of the foreign judgment has expired, and this term was not restored by the Russian court.
- The enforcement of judgment would contradict the public order in the Russian Federation.

ONLINE RESOURCES

Official Russian legislation website

W <http://publication.pravo.gov.ru/>

Description. Official website for publishing Russian legislation. Documents are available in Russian only.

Practical Law Contributor profiles



Daria Ilyina, Senior Associate

Egorov, Puginsky, Afanasiev and Partners

T +7 4959358010

F +74959358011

E daria_ilyina@epam.ru

W www.epam.ru

Professional qualifications. Russian Federation, Attorney-at-Law.

Areas of practice. M&A; corporate law

Recent transactions

- Assisting in restructuring of a leading Russian pharmacy holding.
- Acting for the major Russian company in relation to sale and purchase of shares in airport and arrangements between the new shareholders.
- Advising on structuring of and assisting with the deal on sale and purchase of the building in the Moscow city centre.

Languages. Russian, English, German.

Professional associations/memberships. Moscow City Bar