

Newsletter:

Changes in legislation and clarifications of the Russian Supreme Court on issues related to substitution of persons in obligation

April 16, 2018

Dear Ladies and Gentlemen,

The last clarifications of supreme judicial authority on application of chapter 24 of the Russian Civil Code on substitution of persons in obligation have been made in the information letter of the Presidium of the Russian Supreme Commercial Court No. 120 dated October 30, 2007, in other words, long before the massive amendments, which came into force in 2014.

On December 21, 2017, the Plenum of the Russian Supreme Court (the "**Supreme Court**") adopted Ruling No. 54 "On application of chapter 24 of the Russian Civil Code on substitution of persons in obligation under deal" (the "**Ruling**"), and from June 01, 2018 amendments to the Russian Civil Code provided for by the Federal law No. 212-FZ dated July 26, 2017 "On amendments to Part 1 and Part 2 of the Russian Civil Code and other laws of the Russian Federation" (the "**212-FZ**") shall come into force.

Since a concept of substitution of persons in obligation is extensively applied in practice, we would like to inform you about the key points of the Ruling and the 212-FZ that would be useful for various business sectors, especially for the companies dealing with debt restructuring and factoring issues.

1 Clarifications of the Supreme Court

1.1 Assignment of claim

1.1.1 Absence of a price clause does not make contract gratuitous

The Supreme Court confirmed that an absence of the clause on the price of transferring the claim in the assignment agreement shall not constitute a ground for recognition of the agreement as void or unconcluded *ipso facto*. In this case, the price of the claim shall

be determined based on the price that is usually charged for similar goods, works or services under comparable circumstances. The assignment agreement can be qualified as a gift contract only if an intention of the assignor to donate the rights to the assignee will be established.

1.1.2 Scope of transferring rights

According to the clarifications, the original creditor cannot assign to the new creditor more rights than the original creditor holds. However, the new creditor by the virtue of a special legal status may have additional rights, which the original creditor did not have (*e.g.*, the rights provided for by consumer protection laws).

1.1.3 Moment of transfer of claim

As a general rule, the claim is transferred to the assignee at the moment of conclusion of the assignment agreement. The Supreme Court confirmed that the agreement might set a later moment of transferring of the claim (*e.g.*, expiration of the agreed period, or approach of a condition precedent, or simply on a specific date in the future).

1.1.4 Assign of claim to several persons

According to the Ruling, if the same claim is assigned to different persons, proper new creditor shall be deemed the person in respect of which the moment of assignment is occurred earlier.

1.1.5 Rights of a debtor in case of breach of contractual provision on necessity of the debtor's consent for assignment, the validity of the assignment

One of the most significant clarifications are the following clarifications related to prohibition of the assignment to third parties:

- In the case of assignment of a non-monetary claim, which was made without a debtor's consent, and which makes the performance of an obligation more burdensome, a debtor is entitled to perform the obligation to the assignor. If the transfer of the claim cannot be considered more burdensome for the debtor, however, involves additional expenses, the assignor and the assignee are required to reimburse a debtor for such expenses;
- In the case of transfer of the claim, which was made without the debtor's consent, expenses of the debtor caused by such transfer shall be reimbursed by the assignor and the assignee jointly;
- If the agreement contains a provision on the necessity of obtaining the debtor's consent or prohibition of assignment of non-monetary claims to third parties, the transfer of these claims may be challenged under the claim of the debtor only in the case when it is proved that the assignee knew or should have known about the prohibition;
- Assignment of claim under a monetary obligation in conflict with the provision on the necessity of obtaining the debtor's consent or prohibition of the assignment to third parties may be challenged in the event the assignor and the assignee, by making the assignment, acted with intent to harm the debtor;
- An agreement of the debtor and the creditor may establish the consequences of the lack of the necessary consent to the assignment (*e.g.*, unilateral withdrawal from the agreement).

1.1.6 Notice of transfer of rights

In accordance with the clarifications, the notice of transfer of rights shall contain information that allows the identification of the new creditor and determine the scope of transferred rights. If this information is not sufficient for the performance to the new creditor, the debtor is entitled to perform the obligation to the original creditor or to stay a

performance and request the necessary information from the original creditor.

1.2 Transfer of debt

The Supreme Court confirmed that, if from the agreement of the creditor, the original debtor and the new debtor under the obligation connected with business activities is unclear, whether the original debtor withdraws the obligations or the original and the new debtor has a responsibility to the creditor jointly, it should be assumed that the original debtor is no longer responsible for the obligation.

1.3 Transfer of agreement

According to the Ruling, the invalidity of a provision of the assignment agreement related to certain rights or claims voids the entire assignment agreement, except for the cases when it can be assumed that the deal would have been completed without including invalid provisions. Therefore, a separate clause could be included within the agreement to state that if one provision is declared invalid, it does not affect other provisions of the agreement.

1.4 Procedural Matters

The Ruling confirmed that an arbitration clause remains valid for the new creditor and the debtor, unless otherwise provided by the agreement between the debtor and the original or new creditor.

With regard to the extrajudicial settlement proceeding for dispute resolution that may be established by law or agreement, this procedure is considered to be complied with when the complaint is submitted to the debtor by the original creditor before notification of the debtor of the assignment, and the statement of claim is filed to the court by the assignee, unless otherwise provided by law or the agreement.

2 Changes in the Russian Civil Code

2.1 Direction of the debtor's objections

According to the amendments to Article 386 of the Russian Civil Code, the debtor within a reasonable time after receiving a notice of the assignment is obliged to inform the new creditor of the occurrence of known grounds for

objections to the assignment and provide an opportunity to review them. Otherwise, the debtor will not be entitled to invoke such grounds.

2.2 Invalidity of assignment agreement in case of violation of the prohibition of the assignment

The legislature confirmed that the assignment agreement is valid in case the information on the prohibition of the assignment of the right to receive non-monetary restitution has not been disclosed to the assignee, and the assignee reasonably believed that there is no such prohibition (*e.g.*, when the prohibition imposed not by the main agreement, but by an additional agreement that has not been disclosed to the assignee).

2.3 Exemption of the assignor from liability for the invalidity of the transferred claim

Under the new version of para. 1 Article 390 of the Russian Civil Code, the agreement on the basis of which the assignment is made may provide that the assignor shall not be liable for the invalidity of the transferred claim subject to such invalidity is caused by circumstances that the assignor did not know or could not know or about which he warned the assignee.

The Supreme Court's clarifications and the amendments to the legislation on issues related to substitution of persons in obligation are intended to address certain gaps that caused controversial points in the assignment processes. Significant attention in the Ruling and 212-FZ is devoted to protection of the rights of the faithful parties and to consolidation of the balance of the rights of assignor, assignee and debtor.

We hope that the information provided herein will be useful to you. If you would like to learn more about our [Commercial Practice](#), please, click [here](#).

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В случае возникновения
вопросов, пожалуйста,
свяжитесь с Партнером АЛРУД

С уважением,
Юридическая фирма АЛРУД



**Maria
Ostashenko**

Partner

Commercial, Intellectual Property,
Data Protection & Cybersecurity

E: mostashenko@alrud.com