MANDATORY PRE-COURT DISPUTE SETTLEMENT PROCEDURE FOR COMMERCIAL DISPUTES

Newsletter

Why is it important to read this Newsletter?

If you participate in judicial proceedings in Russia, or plan to do so in future, then it is important to know that from 1 June 2016 the procedural legislation establishes a mandatory pre-court (claims) dispute settlement procedure for all commercial disputes. If this procedure is not followed, a commercial dispute cannot be considered on its merits by a state court.

1. Legal regulation

In accordance with the new provisions of the Commercial Procedure Code of the Russian Federation (hereinafter the "**CPC**") a dispute arising from civil legal relations may be referred for consideration to a commercial court after the parties have taken measures for pre-court settlement on the expiration of thirty calendar days from the date a claim (demand) is sent, unless other periods and/or procedures are established by law or contract.

The explanatory note on the bill indicates that one of the goals of introducing a mandatory pre-court procedure for the settlement of commercial disputes is to reduce the number of disputes that are considered in commercial courts.

Compliance with the pre-court procedure is not required for the following categories of disputes:

- cases on the establishment of legally significant facts;
- cases on awarding compensation for violation of the right to a trial within a reasonable period or the right to the enforcement of a court order within a reasonable period;
- cases of insolvency (bankruptcy);
- cases on corporate disputes;
- cases on defending the rights and lawful interests of a group of persons;
- cases on the early termination of the legal protection of a trademark due to its disuse;
- cases on enforcing the awards of arbitration tribunals.

This procedure will remain binding for all other disputes.

2. Form and content of claims (demands)

According to court explanations[2] a claim is understood to be a demand from an interested party sent directly to a counterparty to settle a dispute between them.

A claim is manifested in the form of a written document that must contain the following:

- the name of the addressee and the party making the claim;
- the clearly stated demand of the claimant (for example, to amend or cancel a contract, to perform an obligation; to settle a debt or pay interest, etc.);
- the circumstances on which the demands are based (for example, reference to the contract from which the dispute arose);
- evidence supporting these circumstances;
- the amount of the claim and a calculation of its amount (if the claim can be measured in monetary terms);
- a list of documents attached to the claim;
- other information required to settle the dispute.

Parties are entitled to specify additional provisions in a contract that relate to the pre-court dispute settlement procedure (deadline for responding to a claim, means and address for sending a claim/response to a claim, etc.).

If the demands contained in a claim do not coincide with the subject of a lawsuit, the court may hold that the claimant did not follow the claims procedure[3].

[1] Federal Law No. 47-FZ dated 2 March 2016 "On Amending the Commercial Procedure Code of the Russian Federation" (enters into force 1 June 2016).

[2] Ruling of the Federal Commercial Court of the East Siberian Circuit dated 4 May 2012 in case No. A19-13744/2011; Ruling of the Ninth Commercial Court of Appeals dated 15 February 2016 in case No. A40-125068/15; Ruling of the Ninth Commercial Court of Appeals dated 14 June 2013 in case No. A40-118805/12.

[3] Ruling of the Federal Commercial Court of the Far Eastern Circuit dated 5 October 2010 in case No. A73-19760/2009.

3. Claims and recovery of interest on funds had and received

There is contradictory judicial practice as to whether, in addition to the principal debt, the claim must indicate the interest for funds had and received (Article 395 of the Civil Code).

A number of courts have indicated that if the contract/law establishes a claims procedure for settling disputes, then this procedure must also be followed in respect of demands for the payment of interest accruing on funds had and received[4]. Other courts maintain the opposite approach[5]. According, it would be advisable that a claim make a demand for the collection of interest in addition to the main demand.

4. Means of sending claims (demands)

Court practice proceeds on the assumption that sending a claim by registered letter with notice of delivery and a description of the contents to the address of the legal entity indicated in the extract from the Unified Register of Legal Entities constitutes sufficient evidence that the claims procedure was followed[6].

At the same time, the important aspect is not that the claim be sent, but that it be delivered (handed over) to the counterparty.

If the claimant sends the claim by e-mail, the respondent may subsequently (i) cite the fact that the parties did not agree in the contract on the possibility of sending documents by e-mail; (ii) declare that the claim was not received; (iii) dispute whether the e-mail address to which the claim was sent belongs to a person authorised to negotiate the pre-court settlement of the dispute[7].

If the respondent has the corresponding evidence at hand, the claim will be dismissed without prejudice. For this reason, potential claimants must be aware of these risks associated with the use of electronic documents.

5. Consequences of failing to follow the mandatory claims procedure

If the claimant has not followed the claims or other pre-court procedure for settling a dispute with the respondent, this may be grounds to defer consideration of a claim (Part 1 of Article 128 of the CPC) or to return the statement of claim (Clause 5 of Part 1 of Article 129 of the CPC), if the claimant does not provide evidence that the claims procedure was followed by the deadline indicated in the ruling to defer consideration of the claim.

If the claim is accepted for proceedings, but in the respondent's opinion the mandatory claims procedure was not followed by the claimant, then (if the respondent has the appropriate evidence) this may be grounds to dismiss the claim without prejudice (Clause 2 of Part 1 of Article 148 of the CPC).

6. Mandatory claims procedure and running of the period of limitations

In accordance with Clause 3 of Article 202 of the Civil Code, the running of the period of limitations is suspended for the period allocated to the parties to resolve a dispute using the statutorily prescribed extrajudicial procedures or, in its absence, for six months from the start of such procedures (mediation, intermediation, administrative procedure, etc.).

The Russian Supreme Court has indicated that the mandatory claims procedure is one such procedure in the sense of Clause 3 of Article 202 of the Civil Code[8].

Thus, these provisions are an incentive to the claimant to use the mandatory claims procedure to settle a dispute without the risk of missing the period of limitations.

In addition, in accordance with Clause 3 of Article 204 of the Civil Code, if less than six months remains in the period of limitations after a claim is dismissed without prejudice, then this period is extended to six months, except for cases where the actions (inaction) of the claimant served as grounds for dismissing the claim without prejudice.

Thus if the claimant did not follow the mandatory claims procedure (as a result of which the claim was dismissed without prejudice), then in this case the period of limitations for the given claim of the claimant is not eligible for an extension[9].

[4] Ruling of the Fourth Commercial Court of Appeals dated 11 September 2013 in case No. A19-5960/2013 (in Judgement No. VAS-18956/13 dated 27 December 2013, the Russian Supreme Commercial Court declined to transfer the case to the Presidium of the Supreme Commercial Court for supervisory review).

[5] Ruling of the Commercial Court of the Moscow Circuit dated 8 August 2014 in case No. A41-56727/13.

[6] Ruling of the Seventeenth Commercial Court of Appeals dated 11 August 2014 in case No. A60-15617/2014.

[7] Ruling of the Eleventh Commercial Court of Appeals dated 24 October 2014 in case No. A72-3196/2014.

[8] Clause 16 of Ruling No. 43 of the Plenum of the Supreme Court of Russia dated 29 September 2015 "On Certain Issues Related to Applying the Norms of the Civil Code of the Russian Federation on the Period of Limitations".

[9] Appellant ruling of the Moscow Regional Court dated 28 May 2014 in case No. A3-11569/2014.

7. Mandatory claims procedure and court costs

In accordance with the clarifications of the Russian Supreme Court, expenses incurred in connection with following the mandatory pre-court procedure for settling a dispute are classified as court costs and are to be collected from the party against which the final court act is issued[10].

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[10] Clause 4 of Ruling No. 1 of the Plenum of the Supreme Court of Russia dated 21 January 2016 "On Certain Issues of Applying the Legislation on Recovering Costs Related to the Consideration of a Case".