

Russia Practice

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Important clarifications by the RF Supreme Court on the conclusion of major transactions and interested-party transactions

On 26 June 2018 the Supreme Court of the Russian Federation published clarifications on challenging major transactions and interested-party transactions. In this newsletter you will find an overview of the most important clarifications issued by the Supreme Court.

Major transactions

A transaction is considered to be a major transaction if all of the following criteria are met:

- **Quantitative criterion:** the price or the book value of the subject of the transaction equals 25 or more per cent of the book value of the assets of the company on the most recent reporting date;
- **Qualitative criterion:** the transaction is out of the company's ordinary business activity, for example, the sale of the main asset or a material change in the sales and distribution market.

Interested-party transaction

The Supreme Court provides the following list of persons whose participation or interest in the transaction gives grounds to identify a transaction as an interested-party transaction: a member of the board of directors of the company, a member of the supervisory board of the company, the CEO, a member of the collegiate executive body of the company, the person controlling the company, or a person who has the right to issue instructions that are binding on the company.

Counterparty check

The Supreme Court pointed out that a third party is not required to check prior to the conclusion of a transaction whether this transaction is a major transaction for the counterparty and whether it had been duly approved, and is entitled to proceed based on the existence of authorities to conclude any transactions.

However, if the counterparty is aware of the circumstances requiring a corporate approval, it should demand the performance of corresponding procedures before conclusion of the contract. Otherwise the transaction may be challenged by the interested parties. Furthermore, the Supreme Court noted that including a representation that all required corporate approvals have been obtained in the wording of the contract will not attest to the good faith of the counterparty.

Burden of proof

The Supreme Court clarifies that a claimant should prove that the counterparty was aware of the extraordinary nature of a transaction, that there had been no due approval or consent to the conclusion of the transaction in question. The previous position of the Supreme Commercial Court* which had placed the burden of proof on the respondent, has lost force.

Statute of limitations

The Supreme Court stated that the limitation period for the claims on the invalidation of an extraordinary transaction should be counted from the day when the head of the company learned or should have learned that the requirements of the law had been violated at the time of the conclusion of the transaction.

An exception was established for instances where a collusion between the head of the company and the counterparty took place. In this case the limitation period starts from the time when another person exercising the authorities of CEO independently or jointly with other persons learned or should have learned about the violation. In the absence of such a person, the limitation period is calculated from the date when the owner of the company or member of its board of directors who filed the statement of claim to the court learned or should have learned of the violation.



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* Para. 2 of clause 6 of the Resolution of the Plenum of the RF Supreme Commercial Court No. 28 "On certain questions connected with the challenging of the major and interested-party transactions" dated 16 May 2014 (<http://www.supcourt.ru/documents/arbitration/17792/>).

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