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REVIEW OF LAW AND PRACTICE OF THE SUPREME COURT OF THE RUSSIAN FEDERATION IN THE FIRST QUARTER 2010

EXPLANATIONS CONCERNING QUESTIONS ARISING IN COURT PRACTICE

Procedural questions

Question: In what manner does a district court consider an application of a party to arbitration proceedings for provisional remedies to be granted in respect of a claim considered by an arbitral tribunal?

Answer. In accordance with Part 4 of Art. 25 of the Federal Law "On Arbitration Courts in the Russian Federation" an application for provisional remedies to be granted in respect of a claim being considered by an arbitral tribunal is submitted by the interested party to the competent court at the place of arbitration or at the location of the property in respect of which provisional remedies may be applied. The application for provisional remedies shall be accompanied by evidence that the claim has been submitted to the arbitral tribunal, a ruling of the arbitral tribunal on the adoption of provisional measures, as well as evidence of payment of the state fee in accordance with the procedure and in the amount established by federal law.

Paragraph 5 of the above-mentioned article establishes that the competent court shall consider the application for provisional remedies in respect of a claim examined by an arbitral tribunal and issue a ruling on adopting provisional measures or denying them in the manner established by the arbitration procedure or civil procedure laws of the Russian Federation.

It follows from the rule cited above that after consideration and satisfaction by the arbitral tribunal of an application for provisional remedies, the relevant party to the arbitration proceedings shall apply to the district court for the implementation of the ruling issued by the arbitral tribunal.

The district court reviews the application for provisional remedies within the time limit and under the rules established by Art. 141 of the Civil Procedure Code. When considering the application, the court assesses its validity as to whether the requested provisional measures are needed and are proportional to the claim filed with the arbitration court, as well as whether the decision of the arbitral tribunal can be enforced (Article 139, paragraphs 1 and 3 of Article 140 of the Civil Procedure Code). Simultaneously, the district court checks whether or not there are circumstances as listed in art. 426 of the Civil Procedure Code that preclude the issuance of a writ of execution following the procedure contained in Part 2 of Art. 142 of the Civil Procedure Code.

The ruling on applying provisional remedies for a claim being considered by the arbitral tribunal or denying such provisional measures, the judge of the district court sets out the reasons on which his conclusions on the merits of the application in question are based.

The ruling of the district court may be appealed in the manner and within the time limits established by Art. 145 of the Civil Procedure Code.

Questions related to the application of the Code of the Russian Federation on Administrative Offences

Question: How is the territorial jurisdiction over cases related to administrative offences listed in Art. 19.7 of the Code of the Russian Federation on Administrative Offences determined, in the event that the body or officer investigating the administrative offence case is not provided the information necessary to resolve the case?

Answer. Article 19.7 of the Code on Administrative Offences provides for administrative liability for failure to submit or to submit in a timely manner information (details) that are required by law to be submitted and are needed to ensure that the body (officer) is able to exercise their lawful activities, except as provided in art. 19.7.1, 19.7.2, 19.7.3, 19.7.4, 19.8, 19.19 of the Code on Administrative Offences.

By virtue of the provisions of Art. 26.10 of the Code on Administrative Offences, the officer in charge of the administrative offence case, has the right to issue a ruling on requisitioning the information necessary to resolve the case. The information sought must be forwarded within three days of the date of receipt of the ruling, and immediately if the administrative offence involves administrative arrest or administrative expulsion.

As a general rule, an administrative offence case is examined at the place where the offence was committed (Part 1 of Article 29.5 of the Code onAdministrative Offences).

However, as follows from the explanation contained in subparagraph "з" of paragraph 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 24 March 2005 No. 5 "On some questions that courts may have when applying the Code of the Russian Federation on Administrative Offences", if the offence is committed in the form of inaction, then the place of the offence should be recognised as the place where the action was to be done, the duty imposed on the person was to be performed.

Since the obligation to provide information lies with the person with respect to whom the relevant ruling was issued, the place where the administrative offence was committed should be deemed the address of the person who did not submit such information to the supervisory authority. Accordingly, the administrative offence case should be considered at the place of the address of such person.

(as worded in the Resolution of the Presidium of the Supreme Court of the Russian Federation dated 08.12.2010)

Question: Is it possible, by virtue of the provisions of Art. 2.7 of the Code of the Russian Federation on Administrative Offences, for an officer of a state or municipal customer authorised to perform functions related to making orders for the supply of goods, performance of works or services for state or municipal needs to be exempted from administrative liability for an offence described in Art. 7.29 of the Code?

Answer. Article 7.29 of the Code on Administrative Offences introduces administrative liability for failure to comply with the requirements of the legislation governing the placement of orders for the supply of goods, performance of works and services for state and munici-

pal needs when deciding on the method of placing an order for the supply of goods, performance of works or services for state or municipal needs.

As follows from the content of Art. 2.7 of the Code on Administrative Offences, a person may be exempted from administrative liability in the event of such person harming legally protected interests in an emergency only if all of the three conditions below are met:

- the existence of a direct threat to the person or any rights of that person or other persons, as well as the interests of the society or the state protected by law;
- such threat can not be removed by other means;
- the harm caused is less significant than the harm prevented.

Part 2 of Art. 10 of the Federal Law of 21 July 2005 Under No. 94-FZ "On the placement of orders for the supply of goods, performance of works or services for state and municipal needs" (hereinafter referred to as the "Federal Law on the Placement of Orders") establishes a general rule whereby in all cases orders are placed through competitive bidding.

The use of any other method of placing an order, that is a method not involving competitive bidding (issuing a request for quotation, placing an order with a single supplier (contractor), placing an order on commodity exchanges) is considered an exception and is allowed only in cases directly set out in that Law.

In accordance with Art. 48 of the Federal Law on the Placement of Orders, a customer is entitled to place an order by requesting quotations from the participants of the order placement process who have been pre-selected in order to eliminate the consequences of natural or man-made emergencies and whose qualifications meet the established requirements.

The list of goods, works and services required to deal with the consequences of natural or man-made emergencies is established by the Government of the Russian Federation.

In the event of a need for goods, works or services that are not included in that list, orders must be placed in accordance with the general rule set out in Part 3 of Art. 10 of the Federal Law on the Placement of Orders, that is the customer is obliged to take a decision on the manner in which the order is placed that is prescribed by this Law (Part 3 of Article 48).

An exception to this rule is contained in paragraph 6 of Part 2 of Art. 55 of the said Law, which provides for the right of the customer to place an order with a single supplier (contractor) if, due to force majeure or a need for urgent medical intervention, there is a need for goods, works, services that are not included in such list, and the use of other methods of placing an order is inexpedient due to the amount of time it will require.

In that case, in accordance with the paragraph referred to above, a state or municipal customer is required to notify the state body or the local government body authorised to control the placement of orders within three working days of the date of signing such contract, with a copy of the emergency investigation report or a copy of the document prepared by the state or municipal customer and confirming the circumstance on the basis of which the contract is entered into and a copy of the contract entered into attached to the notice.

In that case, the officer authorised to consider the case related to an administrative offence described in Art. 7.29 of the Code on Administrative Offences, or the judge considering an appeal against the decision on invoking administrative liability for this offence, when assessing the documents drawn up by the state or municipal customer and confirming the causing of damage due to force majeure, must take into account that the qualifying criteria for the concept of force majeure as listed in art . 401 of the Civil Code of the Russian Federation include the extreme nature of the circumstances that make it impossible to fulfill the obligation, and the impossibility to prevent them from appearing. At the same time, the Civil Code of the Russian Federation contains an indicative list of circumstances that are not force majeure (a debtor's lack of money, lack of goods necessary for the performance on the market, etc.).

Proceeding from the foregoing, in the event there arise circumstances that, in particular, may cause damage, as well as create a direct threat to the person or protected legitimate interests of the society and the state, the customer and the authorised body are not exempted from the obligation to comply with the requirements of the legislation on the placing of orders for the supply of goods, performance of works or services for state and municipal needs when deciding on the method of placing an order.

In that case, in the event of an emergency or force majeure circumstances, if the customer fulfills the conditions specified in Art. 48, paragraph 6 of part 2 of Art. 55 of the Federal Law on the Placement of Orders, no culpability arises for an administrative offence under Art. 7.29 of the Code on Administrative Offences.

However, when deciding whether a person authorised to place an order may be exempted from administrative liability on the basis of Art. 2.7 of the Code on Administrative Offences if such person claims that such person committed a violation of the law governing that area in order to prevent circumstances that could lead to the emergence of a situation threatening the person or the rights of such person or other persons, as well as the interests of the society or the state protected by law , it is necessary to take into account that the persons authorised to place government orders have, by virtue of their official position, a duty to place such orders in a timely manner in order to avoid situations that may result in damage being caused.

If it is determined that the reason why the occurrence of such situations became possible is a previous inactivity of authorised persons resulting in the government order not being placed, for example, within the time period required by the schedule for the performance of works related to the preventive maintenance, repair, replacement and necessary scheduled maintenance of equipment, buildings, structures etc., the provisions of Art. 2.7 of the Code on Administrative Offences concerning the exemption of these individuals from administrative liability may not be applied, and, therefore, they are to incur administrative liability on the basis of Art. 7.29 of the Code on Administrative Offences.

Question: What point in time is it necessary to take as the starting point of the limitation period for commencing administrative proceedings in connection with an administrative offence referred to in Part 1 of Art. 18.8 of the Code of the Russian Federation on Administrative Offences, in the event that a foreign citizen temporarily staying on the territory of the Russian Federation eludes departure from Russia after a certain period of stay?

Answer. Article 18.8 of the Code on Administrative Offences establishes administrative liability for violation by a foreign citizen or stateless person of the stay (residence) regime in the Russian Federation, which consists in failing to comply with the established rules of entry into the Russian Federation, violating the rules of migration registration or movement or the procedure for choosing the place of stay or residence, transit through the territory of the Russian Federation, in there being no documents confirming the right to stay (reside) in the Russian Federation, or in the event of loss of such documents, in failing to file an application in connection with their loss to the relevant authority or in failing to perform the duty of providing a notification confirming that they are residing in the Russian Federation in circumstances defined by federal law, as well as in eluding departure from the Russian Federation after a certain period of stay.

In accordance with Part 1 of Art. 4.5 of the Code on Administrative Offences, the limitation period for commencing administrative proceedings for violation by a foreign citizen or stateless person of the rules of stay (residence) in the Russian Federation is one year from the date of committing the administrative offence. As follows from part 2 of Art. 4.5 of the Code on Administrative Offences, if the offence committed is a continuing offence, the time periods stipulated in part one of this article start to run from the day of detection of the administrative offence, i.e. from the day when the officer authorised to draw up an administrative offence report discovered the fact that the offence was committed.

According to Art. 25.10 of the Federal Law "On the procedure for leaving the Russian Federation and entering the Russian Federation" a foreign citizen who does not have documents confirming the right to stay (reside) in the Russian Federation, and also eludes departure from the Russian Federation after the expiration of the period of such person's stay (residence) in the Russian Federation, is illegally staying on the territory of the Russian Federation and is liable in accordance with the legislation of the Russian Federation.

It should be taken into account that one of the main documents confirming the legality of the presence of a foreign citizen on the territory of the Russian Federation and serving to control such person's temporary stay on the territory of the Russian Federation is a migration card that must be kept by the foreign citizen during the entire period of his/her temporary stay and must be surrendered (returned) at the checkpoint at the state border when he/she leaves the Russian Federation (Article 25.9 of the said Federal Law)

An analysis of the above rules of law allows us to conclude that in the event that a foreign citizen has not left the territory of Russia after the expiration of the period determined by law, his/her actions make him/her guilty of an administrative offence, the objective part of which consists in the fact that such a person is present on the territory of the Russian Federation without documents confirming his/her right to stay (reside) in the Russian Federation, since a visa or a migration card may not, after the expiration of their period of validity, be considered a document confirming the legality of the stay of such foreign national on the territory of Russia

The offence referred to above is a continuing offence and, therefore, the limitation period applicable to it must be calculated from the moment of its discovery.