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### News

**Bulgaria and Romania join the European Union** as of January 1, 2007, increasing the Union's membership to 27 countries with a total population of some 493 million people. However, the two new entrants will not immediately receive all the same benefits accorded to previous acceding countries. (Page 4)

**Slovenia adopts the euro as its official monetary unit effective January 1, 2007**, making the former Yugoslav republic the first of the 10 countries that joined the European Union in May 2004 to adopt the European single currency. (Page 4)

**Russia's new Law on the Protection of Competition** revises the rules governing merger control, antitrust, and state aid, among other changes. (Page 6)

**Latvia's new regulations on the exchange of information on direct taxes** enhance the ability of the State Revenue Service to provide information to, and request information from its counterparts in other E.U. member states and countries with which Latvia has a treaty to prevent double taxation. (Page 14)

**Czech rules on tax penalties and the order of settlement of tax liabilities** are revised under new amendments to the Administration of Taxes Act. (Page 10)

**Estonian protection of trademarks in domain names** is clarified by the Civil Chamber of the Supreme Court in a recent judgment. (Page 15)

**Russian state-controlled natural gas monopoly Gazprom** signs a protocol to pay U.S.\$7.45 billion in cash to acquire a majority interest in Sakhalin Energy Investment Co. Ltd., the previously foreign-owned operator of the U.S.\$20 billion Sakhalin II oil and gas project in the Russian Far East. (Page 30)

**Lithuania's Law on Copyright and Related Rights is strengthened** and harmonized with relevant directives of the European Union. (Page 19)

**Russian restrictions on foreign investment in banks** would be reduced, under new legislation approved by the State Duma. (Page 5)

**Ukraine adopts a new law that will allow foreign banks to open branches** once the former Soviet republic joins the World Trade Organization. (Page 20)

### Analysis & Perspective

**Russia's new Law on Personal Data**, which enters into effect January 26, 2007, has a very broad scope of possible application, as explained by Oleg Shumilov and Julia Borozdna, of Baker & McKenzie, Moscow. (Page 23)

**The Russian Supreme Court's recent resolution clarifying the financial liability of employees for damage to their employers** is analyzed by Dmitry A. Pentsov, of the Froniep Renggli law firm's Geneva office, and Glenn S. Kolleeny and Oleg V. Lovtsov, of the Salans law firm's St. Petersburg office. (Page 26)

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# Russia's Supreme Court Clarifies Financial Liability Of Employees For Damage To Employers

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Employee financial liability for damage caused to employers in Russia is currently governed by Title XI of the Russian Federation Labour Code "Financial Liability of Parties to a Labour Agreement", in particular by Chapter 39 "Financial Liability of an Employee" (Articles 238-250 of the Labour Code).<sup>1</sup> While applying these statutory provisions in resolving disputes, Russian courts have encountered issues requiring clarification by the Russian Federation Supreme Court.<sup>2</sup>

On November 16, 2006, the Plenum of the Supreme Court adopted Resolution No. 52 "On the application by courts of the legislation governing financial liability of employees for damage caused to their employers" ("Resolution No. 52").<sup>3</sup> The new Resolution replaces the previous clarifications of the Supreme Court on this subject, dating back to 1983,<sup>4</sup> which are no longer relevant, because they do not reflect the new Labour Code, adopted in 2001.

This article provides an overview of the main provisions of Resolution No. 52.

## Overview Of Relevant Statutory Provisions

Under the Labour Code, a party to a labour agreement bears financial responsibility for damage caused to the other party of the labour agreement as a result of any negligent or illegal behaviour (actions or omissions to act), unless otherwise provided for by the Labour Code or other federal laws.<sup>5</sup> Each party to a labour agreement must prove the amount of damages sustained.<sup>6</sup>

With respect to causation of damage, an employee must compensate his employer for direct actual losses resulting from the damage caused by the employee. Lost profits (non-received profits (non-received benefits)) are not subject to recovery from employees.<sup>7</sup> Direct actual losses are defined in the Labour Code as the actual decrease of existing property of the employer or the deterioration of this property (including the property of third persons in the possession of the employer, if the employer is responsible for this property), as well as expenses or additional payments for the acquisition or restoration of property.<sup>8</sup> An employee is responsible both for direct actual losses, directly caused to the employer, and for losses caused to an employer as a result of the duty to indemnify damage caused to third persons.<sup>9</sup>

Employees bear no financial liability for damage caused by events of *force majeure*, normal commercial risk, extreme necessity (in Russian, *krainyaya neobkhodimost*) or

non-performance by the employer of its duty of ensuring the necessary conditions for safekeeping of property entrusted to the employee.<sup>10</sup>

Based on the quantum of liability, employees will fall under one of two types of financial liability set forth in the Labour Code: 1) limited financial liability,<sup>11</sup> and 2) full financial liability.<sup>12</sup> As a general rule, employees bear financial liability within the limits of their average monthly wages unless otherwise provided for by the Labour Code or other federal laws.<sup>13</sup> Full financial liability may be imposed upon an employee only in cases provided by the Labour Code or other federal laws.<sup>14</sup>

Under the Labour Code, full financial liability for damage may be imposed upon employees in the following cases:

- damage caused to the employer in the process of performance of labour responsibilities as set forth in the Labour Code or other federal laws;
- theft or shrinkage of goods entrusted to an employee on the basis of a special written contract<sup>15</sup> or received by an employee on the basis of a one-time written authorisation;
- intentional causation of damage;
- causation of damage under the influence of alcohol, narcotic drugs or other intoxicants;
- causation of damage as a result of criminally reprehensible acts, established by court judgement;
- causation of damage as a result of an administrative offence, confirmed by an appropriate state body;
- disclosure of information constituting legally protected secrets (official secrets, commercial or other secrets) as provided by federal law;
- causation of damage outside the performance of labour responsibilities.<sup>16</sup>

In addition, financial liability in the full amount of damages caused to an employer may be established by a labour contract with the director of an organisation, deputy director and chief accountant.<sup>17</sup>

Finally, employees must reimburse their employers for expenses incurred during training paid for by the employer, if the employment contract has been terminated by the employee without justification prior to the expiration of the term set forth in the labour contract or agreement on training employees at the employer's expense.<sup>18</sup>

## No Employee Liability For Normal Commercial Risks

Under the Labour Code, there is no financial liability for employees for damage resulting from normal commercial risk.<sup>19</sup> The Supreme Court clarified that normal commercial risk exists when the following factors are present:

- the acts of the employee evidence modern knowledge and experience;

- the goal established could not have been achieved otherwise;
- the employee has duly performed his official duties, demonstrated a degree of care, and undertaken measures for the prevention of damage;
- the object of risk was of material value, and did not put the lives or health of people at risk.<sup>20</sup>

Furthermore, the non-performance by an employer of the duty to ensure the necessary conditions for safekeeping of property entrusted to an employee can serve as a defence to the employer's claims, if this contributed to the damage.<sup>21</sup>

### **Waiver By The Employer Of The Employee's Duty To Compensate Damage**

Under Article 240 of the Labour Code, the employer has the right, taking into account the particular circumstances of the case, to fully or partially release the employee from the duty to compensate damage.<sup>22</sup> The Supreme Court has further clarified that waiver or release is permitted irrespective of whether the employee bears limited financial liability or financial liability in the full amount, and irrespective of the form of ownership of the organisation.<sup>23</sup> According to the Supreme Court, it is also necessary to take into consideration that the owner of the assets of the organisation may fully or partially limit the right of the employer to waive the right to compensation of damages by the employee in cases stipulated by federal laws, other normative acts of the Russian Federation, the laws and other normative acts of the constituent territories ("subjects") of the Russian Federation, normative acts of the bodies of local self-governance or by the constitutive documents of the enterprise pursuant to Article 240 of the Labour Code.<sup>24</sup>

## **Full Financial Liability**

### **Full Financial Liability Of The Director**

According to the Supreme Court, full financial liability of the director of an organisation for damages caused to the organisation is a matter of law (Article 277 of the Labour Code), and the employer has the right to demand compensation of damages in the full amount irrespective of whether a provision on full financial liability has been included in the labour agreement. The determination of the exact amount of compensation (direct actual loss, damage) shall be made on the basis of federal law according to which the director bears full financial liability (e.g., on the basis of Article 277 of the Labour Code or Article 25(2) of Federal Law No. 161-FZ "On state and municipal unitary enterprises", dated November 14, 2002, or Article 11(1) of Federal Law No. 98-FZ "On commercial secrets", dated July 29, 2004).<sup>25</sup>

### **Full Financial Liability Of The Deputy Director And Chief Accountant**

The Supreme Court has emphasised that, in accordance with Article 243(2) of the Labour Code, full financial liability can be imposed upon the deputy director of the organisation or its chief accountant, if provided for in their labour contracts. If their labour contracts do not provide for full financial liability, in the absence of any other grounds which would allow assertion of full financial liability, the employees' liability would be limited to the amount of their average monthly wage.<sup>26</sup>

### **Full Financial Liability For Commission Of A Crime**

The Supreme Court points out that full financial liability may be asserted against an employee on the basis of Article 243, part 1, section 5, of the Labour Code, if the damage was caused by criminally reprehensible acts, established by court judgement which has entered into legal effect. Since conviction of a crime is a mandatory condition for full financial liability of an employee under Article 243, part 1, section 5, of the Labour Code, the termination of the criminal case at the stage of a preliminary investigation or the dismissal of criminal charges in court, including termination on non-exculpatory grounds (in particular, expiration of the statute of limitations for criminal prosecution, act of amnesty, etc.), cannot serve as a ground for bringing an employee to full financial liability. Nevertheless, the impossibility of bringing an employee to full financial liability under Article 243, part 1, section 5, of the Labour Code does not preclude the employer from demanding full financial compensation of damage from this employee on other grounds.<sup>27</sup>

### **Full Financial Liability In Case Of An Administrative Offence**

Under the Labour Code, full financial liability may be imposed upon an employee for damage caused as a result of an administrative offence, confirmed by an appropriate state body.<sup>28</sup> As the Supreme Court has clarified, in light of this provision, an employee may be brought to full financial liability if, on the basis of consideration of the case by a judge, body, or official authorised to adjudicate cases of administrative offences, an order has been issued imposing an administrative penalty, because in such case the fact of commission of an administrative offence by the employee is established.<sup>29</sup>

If an employee has been released from liability for committing an administrative offence because of its insignificance, an order concerning the termination of administrative proceedings has been issued, and an oral reprimand has been given to the employee, this employee may still be subject to full financial liability because, despite the immateriality of the offence, all the elements of the offence are present, although the employee has been released from an administrative penalty.<sup>30</sup>

Since expiration of the administrative statute of limitations or the declaration of amnesty precludes the application of an administrative penalty, these are unconditional grounds for the exclusion of administrative proceedings, and an employee may not be subject to full financial liability under Article 243, part 1, section 6, of the Labour Code. However, this does not preclude the employer from demanding full financial compensation of damage on other grounds.<sup>31</sup>

### **Methods Of Determining The Exact Amount Of The Employee's Liability**

Under the Labour Code, the amount of damage caused to the employer in case of loss or deterioration of property shall be the actual losses, calculated on the basis of market prices, existing in the locality on the day of causation of damage, but not lower than the depreciated value of property according to accounting records.<sup>32</sup>

The Supreme Court has clarified that, when it is not possible to determine the day of causation of damage, the employer

shall have the right to calculate the quantum of damage on the day of discovery.<sup>33</sup> When, at the time of consideration of the claim by the court, the amount of damages caused to the employer by loss or deterioration of property has changed because of the rise or fall of market prices, the court does not have the right to satisfy the employer's claim in a higher or lower amount than the amount determined on the day of causation (or discovery) of damage, because the Labour Code does not provide for such an option.<sup>34</sup>

## Reduction Of The Amount Of The Employee's Liability

When a court has established an employee's duty to compensate damage, in accordance with Article 250, part 1, of the Labour Code, the court may reduce the amount of compensation, taking into account the degree and form of the employee's fault, his/her financial situation, and any other specific circumstances. However, the court cannot fully release the employee from the duty to compensate damage.<sup>35</sup> The Supreme Court has emphasised that, in accordance with Article 250, part 2, of the Labour Code, the amount of damage subject to compensation by the employee cannot be reduced if the damage has been caused by a crime committed for material gain.<sup>36</sup> In determining the financial situation of the employee, according to the Supreme Court, the courts shall take into account financial conditions (the amount of wages, other primary and secondary sources of income), family situation (the number of family members and other dependents, withholdings), etc.<sup>37</sup>

## Litigating Financial Liability Claims: Practical Aspects

### Jurisdiction Over Disputes Over The Financial Liability Of Employees

The Supreme Court recalled that, under Article 23, part 1, section 6, of the Civil Procedure Code of the Russian Federation,<sup>38</sup> disputes arising out of labour relations, except for the reinstatement of a terminated employee and the determinations that a strike is illegal, are subject to the jurisdiction of justices of peace (in Russian, *mirovye sudy*), irrespective of the amount of the claim.<sup>39</sup>

The Supreme Court has also pointed out that disputes over the financial liability of employees for damage caused to employers, including damage caused outside the performance of labour duties (Article 243, part 1, section 8, of the Labour Code), are subject to the jurisdiction of justices of peace, irrespective of the amount of damage subject to compensation.<sup>40</sup> When the damage has been caused by the employee while the labour contract is in effect, but the employer brings a claim for compensation after the termination of this contract, the case is also subject to the jurisdiction of justices of peace, because, in light of Article 381, part 2, of the Labour Code, such disputes are also considered individual labour disputes.<sup>41</sup>

### Payment Of Court Fees

Under Article 393 of the Labour Code, only employees are relieved from the payment of court fees with respect to claims arising out of labour relations. Employer claims against an employee for compensation of damage require payment of a

court fee in the amount prescribed by Article 333.19, part 1, section 1, of Part Two of the Tax Code of the Russian Federation.<sup>42</sup>

## Circumstances To Be Proven By The Parties To The Dispute

The Supreme Court has pointed out that the circumstances having significant importance for the correct resolution of employer claims for compensation of damage caused by an employee which must be proved to sustain the claim include:

- absence of circumstances excluding financial liability of the employee;
- illegal character of the employee's conduct (actions or omissions to act);
- employee's fault in the causation of damage;
- causal link between the employee's conduct and the damage;
- existence of direct actual damage;
- amount of damage caused to the employer;
- observance of the rules on the conclusion of a contract on the establishment of full financial liability.<sup>43</sup>

If an employer has established the legality of a contract providing for full financial liability of the employee and the diminution of property attributable to an employee, this employee can defend himself/herself only by establishing the absence of his/her fault in the causation of damages.<sup>44</sup>

With respect to claims for compensation of direct damage in the full amount, the employer must also submit proof to the court that, in accordance with the Labour Code of the Russian Federation or other federal laws, the employee may be liable for the full amount of damage and that, at the moment of causation of damage, this employee had reached the age of 18, except in cases of intentional causation of damage or causation of damage under the influence of alcohol, narcotic drugs or other intoxicants, or if damage has been caused as a result of a crime or administrative offence, permitting assertion against the employee of full financial liability before reaching the age of 18 (Article 242 of the Labour Code).<sup>45</sup>

### The Court's Lack Of Authority To Change The Amount Of The Employer's Claim

The Supreme Court held that if an employer has submitted a claim for compensation of damage within the limits of the employee's average monthly wages, but in the course of the court proceedings circumstances giving rise to full financial liability have been established, the court must render a decision on the basis of the initial claim made by an employer and cannot exceed the amount of the initial claim.<sup>46</sup>

### Consequences Of Failure To Submit The Claim Within The One-Year Period

The Supreme Court has emphasised that the courts cannot refuse to accept claims for compensation of damage on the grounds that the employer has missed the one-year term calculated from the day of discovery of damage (Article 392, part 2, of the Labour Code).<sup>47</sup> If an employer misses the deadline for applying to the court, the judge has the right to reject the claim, if this defence has been raised by the defendant prior to a decision and the plaintiff does not justify the delay on grounds which may be considered sufficient to

reinstate the claim (Article 392, part 3, of the Labour Code). Permissible grounds for excusing the delay could be exceptional circumstances out of the control of the employer, which create an obstacle to submitting a claim against the employee before the expiration of the statutory deadline.<sup>48</sup>

## Conclusion

Resolution No. 52 presents a well-drafted clarification of a broad range of legal issues faced by Russian courts in the process of application of the Labour Code provisions on the financial liability of employees. Thus, the adoption of this Resolution should have a positive impact on the jurisprudence of the lower courts, resulting in greater uniformity of decisions throughout the court system of Russia.

## NOTES

- 1 Labour Code of the Russian Federation, dated December 30, 2001, No. 197-FZ, as amended. *Sobranie Zakonodatelstva RF*, 2002, No. 1, Article No. 3.
- 2 Although Russian law belongs to the continental legal system and court decisions do not have the force of legal precedents, the Supreme Court of the Russian Federation has the authority to issue clarifications on the application of statutory provisions in the form of Resolutions of its Plenum, which are mandatory for lower courts.
- 3 Resolution No. 52 of the Plenum of the Supreme Court of the Russian Federation "On the application by courts of the legislation governing financial liability of employees for damages caused to their employers", dated November 16, 2006. Available at: [www.supcourt.ru/news\\_detale.php?id=4610](http://www.supcourt.ru/news_detale.php?id=4610)
- 4 Resolution No. 1 of the Plenum of the Supreme Court of the Russian Federation "On certain matters of application by the courts of the legislation governing financial liability of employees for damages caused to the enterprise, institution or organisation", dated March 1, 1983 (as amended). *Sbornik postanovlenii Plenumov Verkhovnogo Suda i Vyshego Arbitrazhnogo Suda Rossiiskoi Federatsii po grazhdanskim delam* (Collection of Resolutions of Plenums of the Supreme Court of the Russian Federation and Supreme Arbitration Court of the Russian Federation in civil cases) (1999). pp. 599-601.
- 5 Article 233, part 1, of the Labour Code.
- 6 Article 233, part 2, of the Labour Code.
- 7 Article 238, part 1, of the Labour Code.
- 8 Article 238, part 2, of the Labour Code. Pursuant to Letter No. 1746-6-1 of the Federal Employment Service of the Russian Federation dated October 19, 2006, direct actual losses can include, for example, loss of cash, damage to materials and equipment, expenses for repairs, payments for the forced stoppage of work or absence from work, fines.
- 9 Article 238, part 3, of the Labour Code.
- 10 Article 239 of the Labour Code.
- 11 Article 241 of the Labour Code.
- 12 Article 242 of the Labour Code.
- 13 Article 241 of the Labour Code.
- 14 Article 242, part 2, of the Labour Code.
- 15 Special written contracts on full financial liability of employees must be entered into in accordance with Article 244 of the Labour Code. The Federal Employment Service of the Russian Federation also clarified in its Letter No. 1746-6-1 dated October 19, 2006, that such contracts can be concluded only with the specific categories of employees listed in Decree No. 85 of the Ministry of Labour of the Russian Federation, dated December 31, 2002. The long list of categories of employees and types of work includes cashiers, directors, deputy directors and other employees carrying out depository activities, evaluation, verification and destruction of banknotes, operations for the purchase, sale and other forms and types of transactions with money, valuable papers (in Russian, *tsennye bumagi*), precious metals, coins made of precious metals and other currency values, work related to accepting and making all types of payments, etc.
- 16 Article 243, part 1, of the Labour Code.
- 17 Article 243, part 2, Article 277 of the Labour Code.
- 18 Article 249 of the Labour Code.
- 19 Article 239 of the Labour Code.
- 20 Section 5 of Resolution No. 52.
- 21 Section 5 of Resolution No. 52.
- 22 Article 240 of the Labour Code.
- 23 Section 6, part 2, of Resolution No. 52.
- 24 Section 6, part 3, of Resolution No. 52. For example, the state as the owner of the assets of state unitary enterprise (Article 113 of the Russian Federation Civil Code) may fully or partially limit the right of this enterprise to waive the right to compensation of damage by its employees.
- 25 Section 9 of Resolution No. 52.
- 26 Section 10 of Resolution No. 52.
- 27 Section 10 of Resolution No. 52.
- 28 Article 243(1)(6) of the Labour Code.
- 29 Section 12, part 2, of Resolution No. 52.
- 30 Section 12, part 3, of Resolution No. 52.
- 31 Section 12, part 4, of Resolution No. 52.
- 32 Article 246, part 1, of the Labour Code.
- 33 Section 13, part 2, of Resolution No. 52.
- 34 Section 13, part 3, of Resolution No. 52.
- 35 Section 16, part 2, of Resolution No. 52.
- 36 Section 16, part 2, of Resolution No. 52.
- 37 Section 16, part 5, of Resolution No. 52.
- 38 Civil Procedure Code of the Russian Federation, dated November 14, 2002, No. 128-FZ, as amended. *Sobranie Zakonodatelstva RF*, 2002, No. 46, Article No. 4532.
- 39 Section 1, part 1, of Resolution No. 52. Justices of peace are judges of general jurisdiction of the constituent territories ("subjects") of the Russian Federation within the unified court system of the Russian Federation (Federal Law No. 188-FZ "On Justices of Peace in the Russian Federation" dated December 17, 1998, as amended. *Sobranie Zakonodatelstva RF*, 1998, No. 51, Article No. 6270).
- 40 Section 1, part 2, of Resolution No. 52.
- 41 Section 1, part 3, of Resolution No. 52.
- 42 Section 2, part 2, of Resolution No. 52. Tax Code of the Russian Federation, Part Two, dated August 5, 2000, No. 117-FZ, as amended. *Sobranie Zakonodatelstva RF*, 2000, No. 32, Article No. 3340. The amount of the court fee is determined based on the amount of a claim.
- 43 Section 4, part 1, of Resolution No. 52.
- 44 Section 4, part 2, of Resolution No. 52.
- 45 Section 8 of Resolution No. 52.
- 46 Section 7 of Resolution No. 52.
- 47 Section 3, part 1, of Resolution No. 52.
- 48 Section 3, part 2, of Resolution No. 52.