Principal trends in court practice: issues to be taken into account in the area of real estate and construction

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Compensation of customer's expenses to cure defects in contractor's works if the contractor agreement does not stipulate the customer's right to cure them

Overview of Court Practice of the Supreme Court of the Russian Federation No. 2 (2017) (approved by the Presidium of the Russian Supreme Court on April 26, 2017)

Clarification by the Russian Supreme Court

- According to Article 723 of the Russian Civil Code, the customer may claim for compensation of expenses for curing the defects in the contractor's works by its own efforts only if such right is expressly stated in the contractor agreement

- However, if the customer, acting in good faith, has sent the contractor a demand to cure defects in the works within the stipulated or reasonable time (including immediate actions, if they are required by the nature of such defects), but the contractor has failed to cure such defects, the customer's relevant expenses may be subject to compensation

Practical recommendations

- Expressly state in the contractor agreement the customer's right to cure defects in the contractor's works by its own efforts
- Prior to curing defects in the works by its own efforts, the customer needs to send the contractor a written demand to cure such defects and record the time of the contractor's receipt of such demand
- Establish the time period for curing defects in the demand

Construction of a building having more stories than stipulated by the construction permit (1)

Ruling of the Supreme Court of the Russian Federation
dated August 29, 2017 No. 18-КГ17-95

Facts of the case

- The City Administration filed a claim against an individual for demolition of an unauthorized construction, among other things, because the respondent had erected on its land plot a residential apartment building that had more stories than stipulated by the construction permit

Judgment of the Russian Supreme Court

- The Judicial Chamber on Civil Cases of the Russian Supreme Court has refused to recognize the erected building as an unauthorized construction and has remanded the case for a new hearing

Construction of a building having more stories than stipulated by the construction permit (2)

Position of the Russian Supreme Court

- Construction of a building violating the terms and conditions of the construction permit does not constitute a basis for demolition of a facility as an unauthorized construction, provided that the building complies with the following parameters in the aggregate:
  - ✓ Designated purpose and permitted use of the land plot on which it is located
  - ✓ Land use and development rules
  - ✓ Town planning, fire safety, and sanitary rules and regulations
  - ✓ Rights and legitimate interests of third parties
- When resolving the issue of demolition of an unauthorized construction, it is necessary to determine whether it is technically possible to partially dismantle such construction (illegally built stories only)

Construction of a building having more stories than stipulated by the construction permit (3)

Practical recommendations

- Before starting construction, thoroughly review the area planning documentation and land use and development rules; check the designated purpose and permitted use of the land plot in question; obtain authorization documents
- If it is necessary to go beyond the parameters set forth in the construction permit, amend the documentation, obtain a positive expert report in respect of the amended documentation, and obtain a new/adjusted construction permit
- In case of a court dispute, initiate a construction engineering examination

Ceasing negotiations when entering into a lease agreement (1)

Ruling of the Arbitrazh Court of the Moscow District dated November 29, 2017 in Case No. A41-90214/2016
("Auchan Case")

Facts of the case

- Decort filed a claim against Auchan for recovery of damages due to unfair conduct during negotiations
- As a potential warehouse lessee, Auchan approached the lessor (Decort) to negotiate a lease agreement. When the agreement was finalised, after receiving the execution versions of the agreement signed by Decort for its co-signature, Auchan abruptly ceased business contacts with Decort
- Auchan asserted that it failed to obtain the corporate approval of the supervisory board of its parent company, and that Decort failed to provide the consent of the bank-pledgee to the lease agreement

Judgment of the court

- The court upheld the judgments of the lower courts to award lost profits against Auchan in the amount of RUB 15.7 million

Ceasing negotiations when entering into a lease agreement (2)

Position of the court

- When entering into the lease agreement, Auchan acted in bad faith, since there was abrupt and unreasonable cessation of negotiations under such circumstances that the other party could not reasonably have expected it
- Obtaining the approval of the supervisory board of the parent company was not expressly required by Auchan's constituent documents
- The bank's failure to provide its consent by the time of delivery of the execution versions of the agreement was not unexpected by Auchan as the bank had given its consent in principle to the lease

Practical recommendations

- Advise your counterparty that signing a contract is subject to some conditions (corporate approvals, completion of legal/financial due diligence, etc.)
- Promptly inform your counterparty of any new circumstances affecting the course of negotiations and execution of the contract
- Identify in advance any circumstances upon occurrence of which the company will no longer have commercial interest in execution of the contract
- Commence the signing procedure only upon completion of all pre-signing formalities

Termination of a sale and purchase agreement in respect of real estate if the purchase price has not been paid (1)

Ruling of the Supreme Court of the Russian Federation
dated July 11, 2017 No. 78-КГ17-21

Facts of the case

- The seller filed a claim against the purchaser for termination of the sale and purchase agreement and for return of the real estate due to continuing non-performance by the purchaser of its obligation to pay the purchase price, while the title to the property had already passed to the purchaser

Judgment of the Russian Supreme Court

- The Judicial Chamber on Civil Cases of the Russian Supreme Court agreed with the plaintiff's position and recognized as legal its claim to terminate the sale and purchase agreement and to return the real estate to the plaintiff

Termination of a sale and purchase agreement in respect of real estate if the purchase price has not been paid (2)

- Previously, in similar cases there was an uncertainty with registration of title back to the seller
- The issue was resolved by the Plenum of the Supreme Court and the Plenum of the Supreme *Arbitrazh* Court of Russia No. 10/22 dated April 29, 2010
  - Registration of title transfer to the purchaser does not impede termination of the sale and purchase agreement in accordance with Article 450 of the Russian Civil Code
  - If the seller does not receive consideration, the property may be returned under provisions on unjust enrichment
  - Court judgment on return of the property to the seller is the basis for registration of title for the seller
- Nevertheless, after that the Supreme Court and courts of other instances took the contrary position in such disputes (see, *e.g.*, *Ruling of the Supreme Court of Russia dated June 7, 2011 No. 5-B11-27*; *Ruling of the Supreme Arbitrazh Court of Russia dated July 1, 2010 No. BAC-8103/10 in Case No. A56-18347/2009*)

Termination of a sale and purchase agreement in respect of real estate if the purchase price has not been paid (3)

Key arguments of the Russian Supreme Court

- Non-payment of the purchase price is a material breach of the agreement, *i.e.* a breach resulting in the seller losing to a great extent what it was entitled to when entering into the agreement, which, accordingly, entitles the seller to terminate the agreement
- In case of termination of the agreement, the seller may demand that the property transferred to the purchaser be returned based on the provisions on unjust enrichment
- Article 486 of the Russian Civil Code regarding the right of the seller to demand payment for the goods and interest should the buyer fail to pay for the property does not imply that the seller is deprived of the right to terminate the contract based on the material breach of it (Article 450 of the Russian Civil Code)

Termination of a sale and purchase agreement in respect of real estate if the purchase price has not been paid (4)

Practical recommendations

- It is possible to provide in the sale and purchase agreement that non-payment of the purchase price in full or in certain part is a material breach of the agreement by the purchaser
- In a commercial agreement such non-payment of the purchase price may qualify as the basis for unilateral non-judicial repudiation of the agreement by the seller

Full compensation of investor costs when implementing an infrastructure project (1)

Judgment of the Arbitrazh Court of the Moscow City dated June 8, 2017 in Case No. A40-23141/2017; Ruling of the Ninth Arbitrazh Court of Appeals dated September 4, 2017 in the same case ("Bashkir Case")

Facts of the case

- The plaintiffs challenged the Federal Antimonopoly Service's ("FAS") order for the cancellation of a tender for a road construction concession. Despite the loopholes in the law, the FAS had decided that the tender documentation, which provided for compensation of all costs of the concession holder for construction and operation of the facility to be covered entirely by the regional budget, contravened the law

Courts' judgments

- The court of first instance upheld the FAS order, stating that it was not permissible to finance the concession facility completely at the concession provider's expense; however, the court of appeals found the FAS order illegal, recognizing the possibility of full compensation of the investor's costs for construction of the facility from the budget

Full compensation of investor costs when implementing an infrastructure project (2)

Position of the court of first instance	Position of the court of appeals
Financing of concession facility from the budget ***in full*** is not permitted by the law	Full compensation of concession holder's costs is possible, but only through the use of different financing instruments: *capital grant* and *concession provider's payment* (which have different purposes and legal nature)
When concession agreement stipulating full coverage of concession holder's costs is executed, procurement must be carried out pursuant to the Law on the Contract System	The Law on Concessions does not permit full coverage of concession holder's costs for development of the facility by the capital grant alone; however, the concession provider's payment may be applied to compensate for the remaining portion of the costs
Full compensation of private investor's costs is not permitted in relation to any other PPP structures (investment agreement, PPP agreement, etc.)	Unlike the capital grant, the concession provider's payment is not made for a particular purpose and may be used for purposes other than compensation of costs of developing the facility

Full compensation of investor costs when implementing an infrastructure project (3)

Practical recommendations

- When structuring PPP projects, take into account the draft law on amendments to the Laws on Concession Agreements and on PPP, among other things, differentiating the capital grant and the concession provider's payment
- Clearly define the concept of the concession provider's payment in the PPP agreement
- Distinguish the concession provider's payment and the capital grant in the project documentation
- Clearly state the purpose of the concession provider's payment and the capital grant
- Consult with the Federal Antimonopoly Service of Russia prior to implementation of the project

Compelling public interest in the seizure of land plots for state needs (1)

Judgment of the ECHR dated March 28, 2017
in Volchkova and Mironov v. Russia Case

Facts of the case

- Land plot owned by individuals was expropriated by a municipality during implementation of a private investment project for construction of a residential apartment building in order to improve the architectural appearance of the city and resettle inhabitants from buildings not complying with the sanitary regulations

Position of the ECHR

- Russia did not prove the *compelling public interest* in property expropriation
- The claimants' building is not uninhabitable
- Architectural appearance considerations alone do not prevail over the legitimate interests of building owners

Compelling public interest in the seizure of land plots for state needs (2)

Practical recommendations

- In order to protect your rights, it is necessary to examine in detail the circumstances under which the property is being seized, in particular:
  - What interests (public or private) are pursued in expropriation;
  - Whether it is really necessary to seize the property;
  - How such expropriation is actually justified
- Immediately apply to the law enforcement and judicial authorities to challenge the relevant decisions and actions of public authorities

Any questions?

Thank you for your time!

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