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Allocation of court costs in commercial litigation under Russian law

Introduction

The law of court costs is a controversial and still-developing subject in any jurisdiction. It defines the allocation of parties' disbursements of handling a case, for instance, money paid to an attorney (attorney's fees). Court costs may be very high; in fact they can sometimes exceed the sum of money awarded to the winning party in the main proceedings. They may, therefore, be subject to abuses: for example, where a successful party in a case intentionally overprices court costs for its benefit.

The amount of court costs that a losing party should pay is determined by the court. The assessment of the sum of court costs is based on criteria established under particular legislation and case law. However, the general rule of assessment is the principle of reasonableness: court costs should be reasonable in amount. The Russian law of court costs in commercial litigation has recently undergone some major changes that we would like to examine.

General overview

General provisions concerning court costs in commercial litigation can be found in Chapter 9 ('Court costs') of the Commercial Procedure Code of the Russian Federation. The general rule of Russian law of court costs is, similar to English law, that 'costs follow the event', that is to say, the winning party may seek reimbursement of its expenses. Article 101 of the Commercial Procedure Code states that court costs consist of the fee (which is payable upon filing a claim) and legal expenses connected with the consideration of the case by the commercial court. Legal expenses include allowances payable to experts, specialists, witnesses, and interpreters, as well as expenses connected with the inspection of evidence on-site, payments for the services of attorneys-in-law and other persons rendering legal assistance, expenses of a legal entity for the notification

of a corporate dispute (where the law says it is obligatory) and other expenses incurred by persons participating in a case in connection with its being heard in the commercial court (Article 106).

The basic rules of the allocation of court costs are set out in Article 110 of the Commercial Procedure Code. According to these rules, court costs incurred by the persons participating in a case (if a court ruling is delivered in their favour) are recovered from the corresponding party (that is to say, the losing party). Where a claim is partially satisfied, court costs are recovered proportionally (according to the amount of the satisfied claim).

Article 110(2) also stipulates that the recovery of such costs is to be within reasonable limits; however it does not provide any criterion for such reasonableness. Thus, reasonable limits are established by the court at its discretion. In 2004, the Presidium of the Supreme Commercial Court of the Russian Federation¹ made some clarifications about factors that may be taken into account when considering the reasonableness of court costs. Among them are the length of time involved in trying a case, its complexity, the price of services of similar attorneys established in the particular area, and others. In addition, the Supreme Commercial Court also specified the allocation of the burden of proof:² a person seeking reimbursement of court costs should prove the amount of their expenses and the fact of payment, whereas the corresponding party may prove excessiveness of such costs.

If there is a special agreement for the allocation of court costs between the persons participating in a case, a commercial court should distribute such costs according to that agreement (Article 110(4)). Thus, the law also allows contractual allocation.

The rules concerning the allocation of court costs under Article 110 also apply to costs incurred in connection with the consideration of an appeal and a cassation appeal.

The general principle of the losing party paying costs to the winning party, nevertheless, has some statutory exceptions. According to Article 111 of the Commercial Procedure Code, if a dispute emerges as a result of the breach of, for example, an alternative dispute resolution (ADR) procedure by a person participating in a case, then a commercial court should place the costs on this person regardless of the outcome of the case. Similarly, if a person abuses their procedural rights (as well as not performing their procedural duties), then a court may (note: it is not a must) place all the costs on that person provided such conduct has (1) led to disruption of court session, (2) delayed court proceedings, or (3) impeded the case and the delivery of a legitimate court ruling.

As we can see, the statutory provisions on the allocation of court costs are scarce, so most peculiarities are to be found in court practice, especially in the rulings of the Supreme Commercial Court of the Russian Federation.

Recent developments

The inclusion of contingent fee in court costs that can be recovered is one of the most disputed questions in many jurisdictions. Russian law is no exception.

The provision of a contract for legal assistance, which entitles an attorney to the normal fee based on hourly billing and, in addition, a success fee, is very popular among Russian law firms. However the commercial courts of Russia have, at most times, denied the inclusion of a success fee in the costs. The reason for such a denial was the legal position of the Constitutional Court of the Russian Federation,³ where it had found the contractual provision of success fees to be in violation with the current legislation of Russia. Earlier, this view was also shared by the Supreme Commercial Court.

The opinion of the Constitutional Court sparked controversy among legal scholars and practising attorneys. Many of them thought that reimbursement of a success fee is absolutely adequate as such a fee prompts attorneys to better performance of their contractual obligations (let alone the general principle of freedom of contract).

But now the situation has changed. In its recent decision in a particular case⁴ the Supreme Commercial Court allowed a success fee to be included in costs that can be recovered. However, the Court has

made a concession that for this to apply, the entire fee cannot be conditional on the case being successful. On the contrary, the success fee should act as an additional bonus for the services rendered by an attorney. Thus, a contractual provision of ‘no win no fee’ (in case of winning, of course) is still non-reimbursable, that is to say, it is not payable by the losing party under Russian law. Moreover, the Supreme Commercial Court has specifically pointed out that when considering court costs that include a success fee, the commercial court may evaluate the quality of services rendered as well as the knowledge and skills of the attorney who represented the winning party. The general rule of reasonableness of incurred costs is still applicable here.

Another issue that has recently (on the same day as the aforementioned ruling) been resolved by the Supreme Commercial Court⁵ is the possibility of non-parties paying the court costs. Previously, court practice had unanimously found this to be in violation of Article 110(1) of the Commercial Procedure Code, which states that court costs are recovered from the corresponding party (but not from other persons participating in a case, that is to say, non-parties).

In this particular case, heard by the Supreme Commercial Court as a supervisory review, an appeal and a cassation appeal were filed by a non-party (a third person not filing independent claims in respect of the subject matter of a dispute). The Court ruled that under Article 101(2) of the Commercial Procedure Code, costs can be recovered from another person participating in a case (which may not be a party) within reasonable limits. Hence, the Court concluded that costs may be recovered from non-parties as well. This opinion seems very logical as the winning party, nevertheless, does incur a certain loss, and it would be unfair to leave it without any compensation. Moreover, the whole problem is attributable to the inaccuracy of Article 101(1)’s wording.

Conclusion

The Russian law of court costs has many gaps, as the statutory provisions only provide the basic rules for the allocation of such costs. Such gaps are filled by court practice, and especially by the Supreme Commercial Court of the Russian Federation.

The general principle for costs to be recoverable is their reasonableness (‘within

reasonable limits'), but such reasonableness is for the court to decide.

Undoubtedly, the clarifications being made by the Supreme Commercial Court on the subject matter influence the decisions of lower commercial courts (the principle of court practice uniformity). However, it is obvious that all the questions that arise in connection with court costs are far from being resolved once and for all. Besides, the Supreme Commercial Court's view on a particular issue can change substantially. This, for instance, happened with the inclusion of success fees in court costs. Earlier, the Court had found it to be in violation of legislation to recover success fees from the losing party. However, according to the latest position of the Court, it is now possible to recover such

expenses provided they are paid in addition to the normal fee of an attorney (for the legal services rendered). The 'no win no fee' provision is still non-recoverable, though this approach might also be revised later on.

Notes

- 1 The Information letter of the Supreme Commercial Court of the Russian Federation No 82, dated 13 August 2004.
- 2 The Information letter of the Supreme Commercial Court of the Russian Federation No 121, dated 5 December 2007.
- 3 Resolution of the Constitutional Court of the Russian Federation No 1-P, dated 23 January 2007.
- 4 Resolution of the Presidium of the Supreme Commercial Court of the Russian Federation No 16291/10, dated 4 February 2014.
- 5 Resolution of the Supreme Commercial Code of the Russian Federation No 15112/13, dated 4 February 2014.