

Russia: Further Progress on Arbitration

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A recent decision of the Constitutional Court of the Russian Federation ("RF") (Resolution of the Constitutional Court of the RF, No. 10-P of 26th May 2011 (the "Resolution")) has clarified that real property disputes are arbitrable under Russian law – even where the enforcement of an award requires the registration of an interest with the Federal Service of State Registration, Cadastre and Cartography (the "Real Property Registry").

Background facts

The Commercial Bank of Economic Development "The Bank of Kazan" (the "Bank") granted loans to Trade Alliance LLC and DataDot-Zakamy LLC (the "Debtors"), which were secured by a mortgage on real property in Tatarstan owned by BulgarRegionSnab LLC (the "Mortgagor"). The loan and mortgage agreements contained a dispute resolution clause that required disputes relating to the agreements to be submitted to the domestic arbitral tribunal "PRAVO"¹. When the Debtors defaulted on the loans, the Bank commenced arbitral proceedings which sought (inter alia) a direction that the mortgaged property be sold at public auction and the proceeds of sale applied to the repayment of the loans. The arbitral tribunal rendered an award in these terms.

When the Mortgagor refused to comply with the award the Bank applied to the Arbitrazh Court of the Republic of Tatarstan for its recognition and enforcement². In July 2009 that court issued a writ of execution in respect of the award³, which was upheld by the Federal Arbitrazh Court of the Povolzhsky Region in September 2009⁴. Those decisions were submitted for review to the Supreme Arbitrazh Court which then referred the matter to the Constitutional Court⁵.

This referral was no surprise, as there had been doubt about arbitrability under Russian law of disputes relating to real property in the RF. For example, in 2010 the Supreme Arbitrazh Court observed that "there is no uniform practice to determine the competency of arbitral tribunals

¹ For further information about this arbitral tribunal, please see the official website of the Arbitrazh Court of the Republic of Tatarstan: <http://tatarstan.arbitr.ru/proc/TreteiskieSudi/node/1425>.

² To enforce an arbitral award in the RF, one must apply to a competent arbitrazh court for a writ of execution (Articles 236 and 240(1) of the Arbitrazh Procedure Code).

³ *Decision by the Arbitrazh Court of the Republic of Tatarstan of 24th July 2009, Case No. A65-9867/2009-SG5-52.*

⁴ *Resolution by the Federal Arbitrazh Court of the Povolzhsky Region of 24th September 2009, No. F06-9092/2009, Case No. A65-9867/2009-SG5-52.*

⁵ *Resolution by the Presidium of the Supreme Arbitrazh Court of 18th May 2010, No. 634/10, Case No. A65-9867/2009-SG5-52.*

to administer real property disputes”⁶. The case was referred to the Constitutional Court to clarify this issue, although in the context of the law applicable to domestic arbitrations⁷.

The reason for the referral

Under the RF Arbitrazh Procedure Code an arbitrazh (commercial) court can only enforce an arbitral award if it is satisfied that the tribunal had jurisdiction over the dispute⁸. Only civil law disputes are arbitrable under Russian law. Disputes of a public or administrative law nature fall outside this category and within the exclusive jurisdiction of the Russian courts⁹. Further, Article 248 of the Arbitrazh Procedure Code provides that disputes relating to real property fall within the exclusive jurisdiction of arbitrazh courts.

Despite the potential to interpret the provision broadly, in recent years, the arbitrazh courts have made an effort to distinguish between real property disputes, which necessitate the involvement of the Real Property Registry and those which do not. For example, an Information Letter¹⁰ issued by the Supreme Arbitrazh Court in 2005¹¹ (the “Information Letter”), stated that any real property dispute necessitating the involvement of the Real Property Registry (for example, a change in property related rights that required registration with the Registry) was to be regarded as non-arbitrable because of the public and administrative nature of that institution’s functions¹².

As a result, arbitrazh courts had previously refused to enforce arbitral awards which required such amendments. These included awards affecting lease agreements¹³ or involving changes in ownership rights (including mortgages)¹⁴.

The Constitutional Court further held that Article 248 of the Arbitrazh Procedure Code does not prevent real property disputes from being arbitrable per se and should be interpreted merely as excluding the jurisdiction of foreign courts over the disputes referred to therein. Therefore,

⁶ Resolution by the Supreme Arbitrazh Court of 11th March 2010, No. 634/10, Case No. A65-9867/2009-SG5-52.

⁷ The Federal Law “On Arbitration Courts in the Russian Federation” of 24th July 2002, No. 102-FZ.

⁸ Article 239 (1) (3) of the Arbitrazh Procedure Code.

⁹ Article 4 of the Arbitrazh Procedure Code and Article 1 of the Federal Law “On Arbitral Tribunals in the RF” of 24th July 2002 No. 102-F3.

¹⁰ An Information Letter is guidance issued by the Russian Federation Supreme Arbitrazh Court on how specific provisions on legislation are to be interpreted. Such guidance is binding on the lower arbitrazh courts.

¹¹ Information Letter of the Russian Federation Supreme Arbitrazh Court No. 96 on “Review of Practice of Arbitrazh Courts on Cases on Recognition and Enforcement of Foreign Courts Judgments, Challenging Arbitral Awards and on Issuing Writs of Execution for the Enforcement of Arbitral Awards”, 22nd December 2005.

¹² Section 27 of Information Letter of the Russian Federation Supreme Arbitrazh Court No. 96 on “Review of Practice of Arbitrazh Courts on Cases on Recognition and Enforcement of Foreign Courts Judgments, Challenging Arbitral Awards and on Issuing Writs of Execution for the Enforcement of Arbitral Awards”, 22nd December 2005.

¹³ ZAO Kalinka-Stockmann v OOO Smolenskii Passazh, Resolution by the Federal Arbitrazh Court of the Moscow Region on 13th October 2008, Case No. A40/9294-08-1,2.

¹⁴ Resolution of the Federal Arbitrazh Court of the Central District of 20th March 2008, F10-923/2008, Case No. A08-3544/07-3.

real property disputes are arbitrable in the RF (unless the RF courts have exclusive jurisdiction on one of the other bases identified in Article 248)¹⁵.

Having provided this clarification the Constitutional Court remitted the matter back to the Supreme Arbitrazh Court, which issued a writ of execution to the Bank on 27th September 2011.

The implications

Some legal issues remain unresolved (at least in theory). For example, the Resolution did not revoke the Information Letter, which therefore, technically, still remains in force. This, in turn, means that they are both (technically) binding on the arbitrazh courts, even though they are also contradictory. However, court practice is to disregard an Information Letter in favour of a contradictory Resolution. Indeed, the Resolution has already been followed by the 15th Appellate Arbitrazh Court (on 10th June 2011)¹⁶ and the Federal Arbitrazh Court of the North Caucasus Region (on 1st August 2011)¹⁷.

Furthermore, as mentioned above Resolution was in the context of the RF law on domestic arbitration – not international arbitration¹⁸. Therefore, it can only be relied on definitively as applicable to property disputes that are subject to the former, although the prevailing view is that it is likely to apply to the latter as well.

The net result of the Resolution is that real property disputes are now arbitrable under Russian law, which is a positive step for arbitration in Russia. However, clarification in due course that this applies to both domestic and international arbitrations would be welcome.

¹⁵ Which include disputes arising in connection with state property, privatisation transactions, intellectual property, the registration and liquidation of legal entities and other matters.

¹⁶ Resolution by the 15th Appellate Arbitrazh Court No. 15AP-5594/2011, Case No. A53-2313/2011 (a case involving the enforcement of an arbitral award confirming the right to ownership of real property).

¹⁷ Resolution by the Federal Arbitrazh Court of the North Caucasus Region No. F08-4569/2010, Case No. A32-7497/2010 (a case involving a loan default resulting in an arbitral award that directed the sale of mortgage property at a public auction).

¹⁸ The Federal Law "On International Commercial Arbitration" of 1st July 1993, No.5338-1.