

INFORMATION LETTER

Arbitrability of Real Estate Disputes (new approach to the problem expressed in Ruling of the Constitutional Court of the Russian Federation No. 10-P of 26 May 2011)

The Constitutional Court of the Russian Federation reviewed some provisions of the effective legislation for their compliance with the Constitution and answered whether arbitration courts have jurisdiction over real estate claims, as well as competence to pass awards that may entail transfer of title to real estate, state registration of such title and foreclosure of the mortgaged real estate.

Background

The ruling in question was issued following a request of the Supreme Arbitrazh Court of the Russian Federation. Such request was reasoned by uncertainty regarding the competence of arbitration courts which prevented the Supreme Arbitrazh Court of the Russian Federation from passing an award on a case in its charge. Shortly, the background to the dispute is the following: a credit institution filed a law suit to an arbitration court seeking to recover indebtedness under a mortgage secured loan agreement. The arbitration court found in favour of the credit institution and granted an award on enforcement of the mortgaged real estate. The debtor refused to comply with the award voluntarily and the credit institution filed an application to an arbitrazh court seeking an enforcement order. Arbitrazh courts of the first and cassation instances satisfied the demand of the credit institution, and the debtor appealed to the Supreme Arbitrazh Court of the Russian Federation, as, to its viewpoint, arbitration courts had no competence to pass such awards on the disputes affecting real estate title and state registration of it.

Court practice

It should be noted that a firm attitude has recently been formed in court practice, according to which arbitration courts may not declare title to real estate by their awards. Formally, such attitude was based on the concept that resolving of a private real estate dispute provides for a public procedure (state registration of title). Therefore real estate disputes are attributed to public area. Moreover, arbitrazh courts proceeded on the fact that arbitration courts have competence to consider private disputes only ("...related to civil matters"). It would be logical to conclude that arbitration courts have no competence to resolve real estate disputes (an arbitration award obliges a public entity (registration authority) to carry out public actions (enter amendments to the title register) and thereby interferes in the state and power relations, which contradicts to the nature of arbitration proceedings). The Supreme Arbitrazh Court of the Russian Federation has a similar position.

Position of the Constitutional Court of the Russian Federation

The Constitutional Court of the Russian Federation recognized that the reviewed provisions of law are constitutional and disagreed the practice restricting competence of arbitration courts in respect of real estate disputes. Legal position of the Constitutional Court of the Russian Federation is underpinned by the following:

- the Constitution of the Russian Federation guarantees state and court protection, however it acknowledges the right of any person to defend his rights by any method which is not prohibited by law;
- application to an arbitration court is an alternative method to resolve civil disputes, enshrined by law and based on the will of the parties. Upon choosing this method the parties agree to comply with the arbitration court rules;
- arbitration awards are not only binding upon the parties to the proceedings, but also may serve as grounds for some actions to be conducted by other persons: if an arbitration award declares real estate title, a registration authority is obliged to carry out actions related to the registration of such title;
- the state registration of real estate title may not be regarded as a "public element" permitting to equate real estate disputes to public disputes which makes their consideration in an arbitration court impossible;
- public nature of disputes is not reasoned by the type of property, but by the specific character of the disputable relations and parties thereto; state registration requirement is neither connected to parties, nor to type of legal relations, therefore it is not a part of relations of the parties and does not modify private nature of the dispute (its legal nature).

Based on the raised arguments the Constitutional Court of the Russian Federation concluded that **real estate disputes are arbitrable**.

Recommendations

Due to the adoption of the Ruling of the Constitutional Court of the Russian Federation we recommend you to:

- i) consider the possibility to refer threatened real estate disputes to arbitration (international commercial arbitration) court, basing on those advantages that are common to it;
- ii) while wording arbitration agreement (arbitration clause) please determine competence of the respective arbitration (international commercial arbitration) court thoroughly, in order to avoid disputes related to the scope of its competence and invalidity of the arbitration agreement.

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