THE CONSTRUCTION DISPUTES LAW REVIEW

Editor
Hamish Lal

THE LAWREVIEWS

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PREFACE

The number of construction disputes is increasing and thus *The Construction Disputes Law Review* arrives with perfect timing. A number of textbooks on construction law cover the same general legal topography and do so in a similar format constructed around national case law or local rules. This book is different because it recognises the jurisprudential importance of comparative analysis of the key problems in international construction law. This area is complex. International construction law creates a blend of legal questions and there is naturally a high demand for answers. This book seeks to fulfil that demand. Whether the reader is a company executive, a private practitioner, an in-house counsel or an arbitrator, I hope very much that this first edition will prove useful in navigating the complex world of international construction law. In that context, I extend warmly my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work.

The *Review* is not intended to be an exhaustive guide to case law and legislation. It covers comprehensively all aspects of international construction law but does so with a much greater emphasis on the practical aspects and the practical implications of the case law, statutes and procedures. My thinking was to provide an authoritative, clear and accessible text on construction law to assist both those who draft international construction contracts and those who deal primarily with dispute resolution (whether statutory adjudication, mediation, arbitration or litigation). We have focused on time bars as condition precedent to entitlement; right to payment for variations and varied scope of work; concurrent delay; suspension and termination; penalties and liquidated damages; defects correction and liabilities; bonds and guarantees; and overall caps on liability. These topics very often form the battleground in disputes and are constantly in legal flux. For example, the Singapore Court of Appeal in *CAJ v. CAI*[1] recently provided more guidance on apportionment in the context of concurrent delay to completion.

I express, once again, my gratitude to all the excellent contributors from all the jurisdictions represented in *The Construction Disputes Law Review*. Their biographies can be

1 *CAJ v. CAI* [2021] SGCA 102.

found in Appendix 1 and these highlight the wealth of experience and learning from which we are fortunate enough to benefit. I also thank the team at Law Business Research, who have excelled in managing and helping to deliver a project of this size and scope.

Hamish Lal
Akin Gump Strauss Hauer & Feld LLP
London
December 2021

Chapter 8

RUSSIA

Vladimir Kostsov, Anastasia Fomenko and Artem Sirota[1]

I INTRODUCTION

Russian state and state-owned entities are the predominant clients in the Russian construction industry. They tend to insist on take-it-or-leave-it contracts and often prefer to resolve disputes though litigation in Russian state courts. However, Russian state courts are relatively unfit for complex construction matters, on account of both time constraints resulting from their heavy workload and their lack of experience of sophisticated disputes.

Disputes in international construction projects are commonly subject to arbitration. However, arbitration is not available in public procurement cases and, in light of Supreme Court jurisprudence, may also be unavailable in private contracts financed using public funds. Further, enforcement of arbitral awards in Russia is often problematic as Russian state courts tend to interfere with the merits of the underlying dispute, which is often seen to be contrary to the limited review rules established by Article V of the 1958 New York Convention. Finally, recent legislative amendments authorise Russian entities subject to international sanctions to litigate their claims in Russian courts notwithstanding any previously concluded arbitration agreements.

Parties to international projects are normally free to choose either Russian law or foreign law as the law applicable to the merits of their disputes. The choice of Russian law is potentially beneficial in construction projects, as certain matters such as commissioning procedures are largely predetermined by the mandatory rules of Russian law. The choice of Russian law could therefore ensure consistency and integrity of contract interpretation. A disadvantage of choosing Russian law, however, is that its contract law rules may be somewhat rigid. Nonetheless, this disadvantage can largely be mitigated by submitting disputes to international arbitration. Further, a number of legislative amendments in recent years have sought to make Russian law more flexible; for example, by introducing the concepts of representations or warranties, and indemnities.

II YEAR IN REVIEW

Since most complex construction disputes are resolved through arbitration, precedential decisions of the Russian state courts have limited value for international projects. However, some decisions of Russian state courts are noteworthy even in the context of construction arbitration.

1 Artem Sirota is a partner, Vladimir Kostsov is a counsel and Anastasia Fomenko is a junior associate at Sirota & Partners.

For example, in case No. A56-85131/2017, the Russian Supreme Court affirmed a refusal to enforce an arbitral award ordering the client to provide payment for variations in the scope of works. The Supreme Court found that the award violated Russian public policy, as the variations were not based on amendments to the design documentation approved by state authorities as required by Russian law.

A key takeaway is that even where they are subject to foreign law, construction projects nonetheless have to be negotiated and performed in light of Russian law and practice, particularly as regards variation orders and design documentation approval formalities.

III COURTS AND PROCEDURE

i Fora

There are no specialised construction courts in the Russian Federation. Construction disputes are heard primarily by the commercial courts, known as *arbitrazh* courts, which deal with business-to-business disputes. Courts of general jurisdiction deal with business-to-consumer matters. However, the preferred solution for most international and complex domestic projects is to arbitrate construction disputes.

Arbitrazh courts are also responsible for the recognition and enforcement of arbitral awards, as well as for supervising Russia-seated arbitration between commercial parties. Because of recent legislative amendments, Russian *arbitrazh* courts may also find themselves competent to hear construction disputes that the parties agreed to submit to arbitration, if one of the parties is targeted by international sanctions.

ii Jurisdiction

It is advisable to agree on the competent court in the construction contract. Commercial parties that do not refer construction disputes to arbitration often select the Arbitrazh Court of Moscow. However, as this court is the busiest court in Russia, courts outside Moscow are preferable in many cases.

In cases where Russian courts have jurisdiction to hear a dispute, the law provides for a mandatory pretrial procedure for most construction disputes, which requires the claimant to file a pretrial claim with the respondent. If the respondent does not voluntarily comply with the claim within 30 days, the claimant may litigate the matter.

Multi-tier dispute resolution clauses providing for negotiations or mediation before proceeding to litigation are given limited effect in Russia. They may be enforced by Russian courts to the extent that they provide for a formal procedure with defined time limits after which the party may litigate its case. Further, if the court finds that negotiation or mediation would be futile and would not lead to settlement, the court may proceed to the merits of the case in spite of the agreed pretrial procedures.

iii Procedure rules

Construction disputes heard by Russian *arbitrazh* courts are governed by the Commercial Procedure Code. The active role of the judge forms the basis for Russian procedure, and proceedings may be quite inquisitorial. The rules of procedure, as interpreted in case law, are generally mostly suitable for low-value disputes that do not require complex procedural devices such as bifurcation, cross-claims, complex joinders or consolidation and other tools that are often useful for construction disputes.

Heavy caseloads mean that Russian state courts tend to hold brief hearings and usually decide cases through a series of hearings (usually from four to 20 hearings for construction disputes) held over a given interval (e.g., monthly).

A notable peculiarity of Russian procedural law is that most disputes are also subject to a multi-tiered chain of appeals. A judgment of an *arbitrazh* court of first instance may first be appealed to the *arbitrazh* appellate court and then to a circuit court. Afterwards, the dispute may be elevated to the Supreme Court, but it is at the Supreme Court's own discretion whether it takes up a given case. As a result, even though litigation in the court of first instance normally does not take more than one or two years, several rounds of reversals and retrials may ensue upon appeals.

iv Evidence

Russian courts make limited use of fact witnesses and types of evidence other than written documents and expert evidence. However, written witness testimony (affidavits) may have value for Russian courts, especially in an international context. Electronic evidence, such as email correspondence, has received divergent treatment in case law, even though the recent cases indicate a positive trend. Thus, parties to construction contracts that refer disputes to Russian state courts should be mindful of documenting legally relevant events to the maximum extent possible, particularly also in view of the inflated standard of proof Russian courts tend to use to decide cases.

Testimony from party-appointed experts is usually admitted as written evidence but will usually have limited practical weight for Russian courts. Most construction disputes are resolved with the involvement of court-appointed experts, and these may be proposed by the parties or even selected by the court from its own list. In practice, only expert organisations that have a presence in Russia (especially research institutions and universities) are selected as experts. Further, the practical ability of the parties to challenge the conclusions of a court-appointed expert is often limited as courts tend to avoid scrutinising the underlying technical or economic matters, making expert selection crucial.

Discovery is not used in Russia. Instead, parties may ask the court to compel document production, provided that the parties can (1) identify the requested document in specific terms, (2) prove that it is possessed by the relevant party, and (3) demonstrate its relevance or materiality. However, in practice, courts hold divergent attitudes to document production and therefore litigants should be prepared to prove their case without court assistance.

IV ALTERNATIVE DISPUTE RESOLUTION

i Statutory adjudication

There is no statutory adjudication of construction disputes in the Russian Federation. Nonetheless, parties to construction contracts often agree on procedures that closely resemble the 'pay first, argue later' policy behind statutory adjudication in the United Kingdom. In particular, parties may agree on a neutral party, such as an expert, whose decisions are provisionally binding unless challenged via arbitration.

Nonetheless, unlike statutory adjudicator's decisions, enforcement of the interim decisions of contractually agreed neutral parties is potentially problematic. As these decisions do not constitute final arbitral awards, they can normally be enforced only by seeking specific

performance of the contractual obligation to comply with the interim decision, normally through arbitration. However, the extent to which Russian courts would expect arbitrators to verify the merits of an interim decision remains unclear.

In some cases, expedited arbitration procedures may also serve as a valid alternative to adjudication.

ii Arbitration

Arbitration of construction disputes

The most prominent arbitral institution in Russia is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC). As Russia is a UNCITRAL Model Law jurisdiction,[2] the law applicable to arbitration seated in Russia is generally based on internationally recognised principles, including party autonomy.

Select construction disputes are not arbitrable. In particular, public procurement contracts are currently only subject to state court litigation. Case law of the Supreme Court suggests that even private construction contracts financed through public funds may be non-arbitrable. A number of other generally applicable restrictions on arbitrability of disputes, such as insolvency, may also apply.

Investment arbitration

The International Centre for Settlement of Investment Disputes Convention, which provides a self-contained regime of investor–state dispute settlement, is not in force with regard to the Russian Federation.

However, Russia is party to a significant number of bilateral investment treaties (BITs) that may provide for the investor's right to arbitrate claims against Russia. As a result, in some cases, claims relating to international construction projects may be submitted not only to commercial arbitration or litigation but also to investor–state arbitration, depending on the wording of a particular BIT and the dispute in question. In complex projects, steps necessary to secure the availability of investor–state arbitration should be considered prior to signing the relevant construction contract.

Enforcement of foreign arbitral awards

Russia is a party to the 1958 New York Convention, meaning that foreign arbitral awards are generally enforceable in Russia except on limited grounds specified in Article V of the New York Convention.

However, Russian courts tend to interpret the public policy exception[3] quite broadly. As a result, in 2020, Russian courts enforced around 76 per cent of arbitral awards sought to be recognised in Russia. In many cases, enforcement of arbitral awards may require relitigation of key issues before a Russian court. Therefore, if enforcement in Russia is anticipated, Russian law counsel should be involved in the arbitration concerned at an early stage.

2 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, commonly known as the UNCITRAL Model Law.

3 Article V(2)(b) of the New York Convention.

iii Mediation

Mediation is a recognised form of alternative dispute resolution (ADR) in Russia and is subject to a separate statute. However, mediation is not currently a widespread option for construction projects.

Generally, disputes can be submitted to mediation by concluding a mediation agreement. Mediators are not entitled to issue binding decisions but instead seek to facilitate voluntary settlement of the dispute between the parties. Mediation procedure generally follows internationally recognised principles, including the principle of confidentiality.

iv Other ADR methods

Arbitration and, at times, contractually agreed expert determination remain the principal ADR methods. However, the Russian government seeks to promote other ADR methods to reduce the workload of state courts. For example, recent legislative amendments introduced the 'judicial conciliation' procedure, which is similar to mediation but is carried out by a judge emeritus and is generally free of charge for the parties. Like mediation, judicial conciliation requires an agreement between the parties and is not capable of producing a binding decision.

V CONSTRUCTION CONTRACTS

i Public procurement

Public procurement in Russia is governed by the Public Procurement Act.[4] This statute normally requires competitive tenders and auctions, which have to comply with the principles of transparency, equal treatment and competition. The Federal Antimonopoly Service (FAS) has the authority to rule on review applications submitted by private parties and may order remedial measures, such as the invalidation of a particular public tender. FAS normally has to issue a ruling within five business days of submission of a review application.

An application to FAS does not automatically suspend the procurement procedure, but FAS may order suspension of the procurement upon considering the relevant review application. Rulings of FAS may be challenged in *arbitrazh* courts. Alternatively, private parties are also free to challenge public procurement procedures directly in court, which may suspend the procurement procedure and may invalidate a public contract concluded as a result of a defective public tender. However, according to public statistics, in 2020, only 2.5 per cent of procurements were invalidated as a result of various challenges.

Procurement by private entities owned by the state is also regulated by federal law[5] but is generally more flexible and can be largely based on privately developed procurement rules. Procurement decisions of these entities may also be challenged before FAS and via litigation.

ii Contract interpretation

Contract interpretation in Russia is based on a combination of objective and subjective methods. Both pre-contractual discussions and subsequent conduct of the parties are potentially relevant to interpretation, particularly where the contractual language is unclear.[6]

4 Federal Law No. 44-FZ dated 5 April 2013.

5 Federal Law No. 223-FZ dated 18 July 2011.

6 Article 431(2) of the Russian Civil Code.

Since Russia is a civil law jurisdiction, the Russian Civil Code contains a significant number of implied terms. For example, unless the parties expressly agree otherwise, Russian law normally assumes the construction price is not subject to variation. However, some implied terms may not be optimal for international projects, which has to be kept in mind when drafting contracts subject to Russian law.

It is customary for parties to agree on 'no oral modification' clauses in construction contracts. These clauses tend to be enforced by Russian courts and, in many cases, the absence of a written agreement bars the contractor's claim for additional compensation in a lump-sum contract. However, in some cases, Russian courts may avoid applying no oral modification clauses, particularly by finding that certain works are sufficiently distinct from the initial scope of works to form a separate contract rather than a modification of the existing contract. As a result, the customer may be obliged to pay for variations in the scope of works without a written agreement.

VI COMMON SUBSTANTIVE ISSUES AND REMEDIES

i Time bars as condition precedent to entitlement

Time-bar provisions may be either agreed by the parties or implied by law. In the absence of contractual wording, Russian law requires the contractor to notify the client about several adverse events, such as identification of works not accounted for in the design documentation and breaches of the works schedule, within a 'reasonable time'. If the contractor breaches this duty, the contractor may be precluded from invoking these circumstances in court.[7]

As for contractual time-bar clauses, their enforceability in a Russian court is not always straightforward. Contractual terms requiring a party to submit its claims within a specified period were traditionally unenforceable in Russia. However, the 2015 legislative amendments expressly recognise contractual clauses that bar the exercise of certain rights following the passage of time. Nevertheless, there is still no established case law applying these amendments to typical time-bar clauses in construction contracts.

ii Right to payment for variations and varied scope of work

Generally, the contractor may only claim payment for variations where the client consented to a price increase, usually through a written addendum to the construction contract. Even the fact of the client having signed off on an acceptance statement elaborating on the varied scope of works and their price is not normally treated as consent to pay for the variations.

However, courts tend to draw a distinction between (1) works necessary to achieve the initial work result, and (2) works that could be part of a distinct construction project. Courts mostly reject claims for additional works that were necessary to achieve the initial result, but they tend towards recovering works proven to be distinct from the initial assignment. However, the dividing line between these cases is often blurred.

7 Articles 716 and 743 of the Russian Civil Code.

In addition, courts tend to consider whether the client initiated the variations and whether the client was aware that they would involve additional payment. If the variations were performed without the client's instruction, the contractor may not be able to recover additional payment except where they were urgently required in the interest of the client.[8]

iii Concurrent delay

Generally, both the prevention principle and apportionment apply in Russia. If the client prevents the contractor from performing works on time and the entire delay is attributable to the client, the contractor is released from liability. If the client merely contributed to the delay, the contractor's liability is to be reduced accordingly.

However, in practice, it is often virtually impossible to prove that a particular delay was wholly caused by the client. Instead, apportionment of liability between the parties is usually a more realistic goal. However, even this goal is often quite challenging, since Russian courts rarely rely on witness evidence and treat unilateral documents with suspicion. As a result, contractors are generally advised to take a proactive approach to evidence on the causes of delay during the entire construction project.

Even where evidence of the client's contributory fault is presented, Russian courts tend to require a showing that the contractor promptly informed the client of the concurrent delay and suspended the works pending the client's instructions.[9] If the contractor did not inform the client about its default before the dispute arose, Russian courts may reject the contractor's concurrent delay defence.

iv Suspension and termination

Suspension of the construction contract

Russian law contains a broad rule[10] that obliges the contractor to suspend the works and wait for client instructions if the contractor discovers circumstances that endanger the fitness or durability of the work result or make it impossible to finish works on time. In addition, the contractor may suspend its obligations if the client fails either to provide payment or to comply with other obligations, thus hindering the contractor's performance.[11]

However, parties normally wish to agree on more specific contractual wording regarding the suspension procedure. In particular, it is common to agree on specific periods of payment delay that justify suspension of works.

In suspending the works, parties must often comply with public law requirements that largely depend on the particular project in question. For example, suspension of works may trigger an obligation to conserve the work result, which may require considerable expense. The formal decision to perform conservation works usually has to be taken by the client. Normally, if the suspension of works is not attributable to the contractor, the client is obliged to pay for the conservation works.

8 Article 743 of the Russian Civil Code.

9 Article 716 of the Russian Civil Code.

10 Article 716 of the Russian Civil Code.

11 Article 719 of the Russian Civil Code.

Termination of the construction contract

Under Russian law, the client is normally free to terminate the construction contract for convenience, subject to payment for performed works and compensation of losses capped by the remaining contract price.[12] However, parties usually exclude recovery of lost profits in the event of termination.

Either party may terminate the construction contract for cause in cases of fundamental breach. However, the threshold for fundamental breach is often open to dispute and the propriety of termination may be subject to judicial review. Therefore, it is common for contracting parties to agree on tailored grounds for contract termination, such as the exact number of days of payment delay sufficient for contract termination.

Procedurally, contract termination usually entails a written notice to the other party. In construction projects, public law may impose certain additional requirements, particularly as regards the handover of hazardous industrial facilities, which are often registered in the contractor's name.

v Penalties and liquidated damages

Russian law recognises contractually agreed penalties. However, as a matter of practice, Russian courts commonly alter pre-agreed penalty arrangements on the ground of proportionality.[13] Arrangements where the penalty is calculated based on the entire contract price rather than the price of the delayed unit of works are especially prone to judicial interference. A relevant consideration is also whether the penalties are equally applicable to each party.

Judicial interference with contractual penalties is often a substantial consideration in favour of arbitrating construction disputes. Nonetheless, since Russian courts perceive proportionality of penalties to be an issue of public policy, Russian courts may refuse to enforce arbitral awards ordering substantial penalties.

vi Defects correction and liabilities

Russian law imposes statutory liability for defects. The contractor is normally responsible for defects identified within five years post-completion. Unless the contract provides otherwise, the contractor is liable for deviations from the design documentation and technical rules, as well as for the achievement of design characteristics of the construction object, such as production capacity, and for its fitness for use.[14]

In addition, it is common to agree on contractual quality warranty. However, if the contractual warranty is shorter than the statutory liability period of five years, the client may usually still bring claims for defective performance during the statutory period if it proves that the defects arose for reasons attributable to the pre-completion period.[15]

Correction of defects may cause substantial disputes between the parties to a construction project, particularly as regards the exact rectification method. In choosing the rectification method, parties should pay attention not only to private considerations, such as costs, but also to public law requirements, which may necessitate consultations with state authorities.

12 Article 717 of the Russian Civil Code.

13 Article 333 of the Russian Civil Code.

14 Article 754 of the Russian Civil Code.

15 Articles 724(4) and 756 of the Russian Civil Code.

vii Bonds and guarantees

Construction projects usually make use of advance payment guarantees and performance guarantees, which are usually issued by banks. The guarantor is normally obliged to comply with the beneficiary's payment demand upon provision of formal documents specified in the guarantee itself, regardless of any extraneous circumstances. Advance payment guarantees are usually on demand, while performance guarantees may be either on demand or subject to the provision of certain documents, such as an expert witness report demonstrating a construction defect.

In extraordinary cases, Russian law allows the guarantor to reject a payment demand if it is clear that the beneficiary is acting in bad faith, such as by seeking double compensation. Nonetheless, banks rarely invoke this exception both as a matter of preserving their reputation and because of the risk of liability involved.

However, a major restraint on demands on guarantees is that, after receiving payment from the guarantor, the beneficiary may be obliged to repay the amount with interest if the court subsequently finds that the beneficiary was not contractually entitled to demand payment. In that case, the beneficiary may also be liable for damages.

viii Overall caps on liability

Generally, Russian law imposes no statutory liability caps and does not exclude any specific types of liability. However, only harm that is sufficiently proximate to a breach is judicially compensable. The precise threshold for the proximity of harm is not settled in case law. Certain types of harm, such as penalties paid by the general contractor to the construction owner as a result of the subcontractor's default, are especially controversial. As a result, detailed contractual language on the extent of liability of both parties is often necessary.

Generally, parties are free to negotiate liability caps and exclude certain types of liability. For example, parties may agree that penalties to be recovered from the contractor are capped at 10 per cent to 15 per cent of the contract price. It is also extremely common to agree on the exclusion of lost profits. However, some common law-style clauses such as exclusion of consequential losses may be ineffective without clarifying language, as Russian courts are not familiar with these notions and may not apply them as intended.

Limitation of liability clauses are unenforceable if a particular breach is intentional. According to Supreme Court guidance, the breaching party bears the burden of proving that a particular breach was not intentional by showing at least a minimal level of care. Further, a major peculiarity of Russian law is that Article 723(4) of the Russian Civil Code provides for the contractor's unlimited liability for construction defects caused by 'culpable' action or inaction, which is at times interpreted to include negligence.

VI OUTLOOK

Construction disputes in the Russian Federation will most likely remain in their current shape. State court litigation will continue to be a rather unattractive option for international projects, as the Supreme Court has not sought to actively develop this area of law.

Thus, most complex contracts will still be subject to arbitration. However, a move to Asian arbitral institutions can be expected to accelerate, with Hong Kong and Singapore in

particular gaining prominence among Russian businesses because of Western sanctions. In light of the increasing threat of international sanctions, we also expect that Russian parties will increasingly seek to rely on Russian law and Russian state courts or Russian arbitral institutions. In this respect, contractual provisions, including expert determination prior to litigation or arbitration, might be especially useful to mitigate the risks for the foreign party.

Appendix 1

ABOUT THE AUTHORS

ARTEM SIROTA

Sirota & Partners

Artem Sirota is a founding partner at the Sirota & Partners law firm with over 20 years of experience advising international clients on various real estate and construction projects in Russia, including but not limited to construction disputes, public aspects of real estate transactions, legal regulations regarding zoning of territories and real estate, and consultations on design documentation and land surveying projects.

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