

ClientAlert

Dispute Resolution

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Russian Federation Supreme Commercial Court's Review of Issues Arising in Cases Involving Foreign Parties



This alert analyses the most important legal positions adopted by the Presidium of the Russian Federation Supreme Commercial Court (the "SCC") in its recently published Review of certain issues arising in commercial courts' cases involving foreign parties (the "Review")¹. The SCC not only summarized a number of positions taken in earlier commercial court decisions but also set out several rules that had not previously been established by the SCC.

Notably, the Review contains a number of provisions that will enable appropriate and positive developments to take place in the resolution of disputes involving foreign parties. This alert analyses the most significant of these provisions, namely:

- the principle that a jurisdiction clause is still effective in the event of an assignment of a right under the principal agreement;
- the principle that a party loses its right to object on jurisdictional grounds if it does not make such an objection prior to the first statement on the merits of the case;
- the recognition that the formal registration of a governing body, branch or representative office of a foreign party in the Russian Federation is not sufficient to establish the jurisdiction of the Russian courts;
- the recognition that parties can agree on the governing law through their pleadings;
- the difference between imperative and super-mandatory rules;
- the statement that it is not necessary to legalise or affix an apostille to a power of attorney to represent a foreign party in court;
- the recognition that a Russian court is able to grant interim measures in support of a dispute which is being considered by a foreign court.

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¹ The Review is provided in the Information Letter of the SCC Presidium dated 9 July 2013 No. 158 which is available on the SCC website: http://arbitr.ru/as/pract/vas_info_letter/89295.html.

Similar regulation of jurisdiction clauses and arbitration clauses

The Review resolves a number of issues relating to jurisdiction clauses in a similar way to the way in which such issues are regulated in the context of arbitration clauses.

In particular, the Review contains an important conclusion that a jurisdiction clause **continues to be effective in the event of an assignment of a right under the principal agreement** (para. 5 of the Review). A similar principle previously emerged in the SCC's practice concerning arbitration clauses.² Therefore, the same rule applies with respect to jurisdiction clauses and arbitration clauses, whereby such clauses continue to be effective in the event of an assignment of a right under the principal agreement.

Another conclusion aimed at alignment of the legal regulation concerning arbitration and jurisdiction clauses manifests itself in the rule that a **Russian court may consider a case involving a foreign party unless a party to the proceedings challenges the court's jurisdiction to hear such a case prior to the first statement on the merits of the case** (para. 7 of the Review). It is important to note that unlike this conclusion of the Review the provisions of the Kiev Treaty³ allow a party to legal proceedings to challenge the court's jurisdiction up until the point that the judgment is rendered.⁴ Consequently, the legal regulation on this issue differs on the level of the international treaty and the domestic law.

Russian courts' jurisdiction in cases involving foreign parties

The SCC considered the effect of a number of rules concerning Russian courts' jurisdiction over cases involving foreign parties.

The rule that commercial courts have jurisdiction over cases involving foreign parties, **if a governing body, branch or representative office of the foreign party is located in the Russian Federation**,⁵ was clarified to include a provision that the claims presented in the relevant case **must necessarily follow from operations in which such governing body, branch or representative office are involved** (para. 8 of the

Review). The Review instructs the courts to consider the location where performance of the relevant agreement is to take place, the location of the majority of the evidence, the governing law of the agreement, and the evidence connecting the agreement to the Russian Federation when assessing such claims.

The SCC set out a legal position according to which **a branch or representative office of a foreign party is defined as a permanent establishment through which the foreign party carries on all or some of its business operations** (para. 9 of the Review). Accordingly, for a Russian court to have jurisdiction over a dispute involving a representative office or a branch of a foreign entity, it is not necessary that such representative office or branch be registered in the Russian Federation, and the Russian court may recognise that it has jurisdiction if the representative office is in fact operational.

Determining the governing law

The Review sets out a rule that, **if the parties refer to the same governing law in their arguments supporting their claims or objections** (for example, in a statement of claim and a response thereto), **the parties will be deemed to have entered into an agreement that the law to which they have referred is the governing law** (para. 13 of the Review)⁶.

The Review establishes that, **regardless of the governing law chosen by the parties, the court will apply super-mandatory rules in the course of the resolution of disputes** (para. 16 of the Review). The SCC clarified what constitutes a super-mandatory rule and stated that not all imperative rules existing in Russian law may be deemed to be super-mandatory.

By virtue of Article 1192 of the Civil Code of the Russian Federation (the "RF CC"), super-mandatory rules include only those imperative legal rules which apply to the relevant relationships regardless of the applicable law as a result of a statement to that effect in the rule itself or as a result of the special importance of the rule, in particular the need to protect the rights and legally protected interests of parties in civil law relationships. Such rules include the provisions of the Strategic Investment Law.⁷

² Para. 15 of the Information Letter of the SCC Presidium dated 16 February 1998 No. 29.

³ The Treaty of the CIS Countries dated 20 March 1992 "On the Procedure to Resolve Disputes Arising out of Business Operations" (the "Kiev Treaty").

⁴ Article 4(2) of the Kiev Treaty.

⁵ Article 247 (1(2)) of the Russian Arbitrazh (Commercial) Procedure Code, para. 5 of the Resolution of the SCC Plenum dated 11 June 1999 No. 8, para. 1 of the Information Letter of the SCC Presidium dated 25 December 1995 No. 10.

⁶ This rule had previously been discussed by commentators and applied by the International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation (Award No. 12/2007 dated 10 October 2007 of the International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation).

⁷ Part 2 of Article 2 of Federal Law No. 57-FZ dated 29 April 2008 "On the Procedure to be Followed to Allow Foreign Investment to be Made in Commercial Companies that are Strategically Important for the State's Defence System and the State's Security." Under this rule, foreign countries, international organizations and entities controlled by international organizations may not enter into transactions which result in control being acquired over Russian commercial companies that are strategically important for the state's defence system and security.

A rule will not be a super-mandatory rule if Russian law permits the application of foreign law to the matter to which the rule otherwise applies (for example, under Article 1208 of the RF CC, the statute of limitations may be governed by foreign law).

Requirements to the proper form of a power of attorney

The SCC stated that there is no need to legalise documents that were issued within the ambit of private law and that are not official, for example, **a power of attorney to represent a foreign party in court** (para. 27 of the Review). However, if the document contains a notary's certification it should be legalised.

We note that Russia has signed treaties abolishing legalisation requirements with a number of states and, accordingly, official documents coming from such states need not be legalised and need not have any apostille affixed.

Applying interim measures

Of great significance for the resolution of international disputes is a rule that was not previously set forth in legislation, but was developed by the courts and is confirmed in the Review. In accordance with this rule, **a Russian court may grant interim measures in connection with a claim which is being considered on the merits by a foreign court, if the Russian court has effective jurisdiction**. "Effective jurisdiction" is defined in accordance with clauses 90 and 99 of the Russian Arbitrazh (Commercial) Procedure Code. Specifically, it includes jurisdiction over the applicant's location, or the location of funds

or other assets in dispute in respect of which the applicant is petitioning for the application of measures to protect its property interests, or the location where the applicant's rights were breached (para. 30 of the Review).

Therefore, a Russian court may grant interim measures not only when it is considering a case on the merits, but also when a case is being considered by a foreign court and the requested interim measures have an objective connection to the Russian Federation. In this case the court is required to verify that the foreign court has jurisdiction to consider the case on the merits and that the exclusive jurisdiction of Russian courts is not breached by consideration of the case in a foreign court.

However, the question remains as to whether, prior to granting interim measures, a Russian court is required to verify that there is an objective connection of the dispute with the relevant foreign state,⁸ and that there are legal grounds to recognise and enforce a future decision in the Russian Federation.

Other points of note

Apart from the provisions of the Review which have important practical application and which are analysed in this alert, other significant more general matters are also addressed in the Review. These include the setting out of a detailed procedure to be followed when ascertaining the application of foreign law as well as a number of provisions on determining the status of foreign parties in Russian court proceedings.

⁸ For example, in proceedings commenced by Fringilla Co. Ltd against Rybprominvest LLC to recognise and enforce a Cypriot court ruling (see the Resolution of the SCC Presidium dated 23 October 2012 No. VAS-7805/12), the SCC Presidium in determining whether a foreign court had jurisdiction over the case, assessed the connection between the dispute and the relevant foreign state (Republic of Cyprus). The SCC has not ruled out the possibility that such an assessment may be deemed necessary when a court considers a petition to apply interim measures.

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