

Diana Solopchenko commented on the risks of violation of investors' rights and interests resulting from investment contracts entered into between the Government of Moscow acting as a counterparty and the investors.

Soon after assuming the position of Mayor of Moscow on 21 October 2010, Sergey S. Sobyanin, former Head of the Administrative Office of the President of the Russian Federation, cancelled around 30 percent of the investment contracts which had been entered into between the Government of Moscow and various investors during the governance of former Mayor of Moscow Yuri M. Luzhkov. These cancellations were considered to have violated investors' rights and interests and resulted in numerous court cases.

Among the biggest investors involved in these contracts and affected by the cancellations were large real estate developers including Glavmosstroj, SU-155, DSK-1, Krost, Inteko, Barkly, and many others.

The main problems arising from these cancelled contracts are obvious. Real estate developers started to fulfil their obligations according to the investment contracts, drawing up city planning and technical documentation, producing construction designs, taking preliminary steps to prepare for constructing new buildings, settling the terms of land usage provisions, and making land rent payments. Meanwhile, the Government of Moscow either did not take any steps to fulfil its obligations under the contract, or delayed the fulfilment of its obligations. Some of the Government of Moscow's decisions to stop the construction process were taken on the grounds of 'inexpedience' of further fulfilment of the investment project.

It is not only the huge amount of time and determination that investors expended in fulfilling their contract obligations, but also the voluminous expenses they incurred, most of which were very difficult to prove in court.

According to the Civil Code of the Russian Federation, subjects of the Russian Federation – republics, regions, areas, federal cities, autonomous regions, autonomous areas, and also towns, villages and other municipal units – act on equal terms with other participants of relations, individuals and legal entities. Thus Moscow, in the 'person' of the Government of Moscow, has equal rights with investors.

But when it comes to protecting investors' rights in court, judges often demonstrate an unwillingness to admit there has been any violation of investors' rights, and there are numerous reasons for this.

Firstly, it is not in the habit of the judicial system of the Russian Federation to be particularly loyal when it comes to charging any of the Russian authorities with additional expenses. The primary idea is to avoid wasting money in Moscow's budgets.

Secondly, investors themselves usually do not provide courts with all the written evidence and relevant supporting documents relating to their expenses, and not only because of their negligence. Sometimes it

is not possible to prove expenses without the material outcome of what has been done. Sometimes real estate developers have commenced construction, or have taken other steps, before receiving official approval from state authorities; thus their actions are considered illegal in court, making it impossible for them to obtain any compensation from the counterparty.

There are examples of courts stressing the illegality of commencing a build before obtaining official settlements of land rent or the land usage, and thus declining investors' claims. Other court decisions show that claims were declined because the investment contracts did not provide for the obligation to return any advance payments.

Nevertheless, the situation is not entirely pessimistic. Despite numerous examples of investors losing cases, there are plenty in which investor claims were satisfied. The court practice of 2012 is full of such positive decisions, satisfying investors' claims for compensation arising from expenses and damages, and many such cases were adjudicated by the Federal Arbitrazh (Commercial) Court of Moscow.

It is easier for investors to claim expenses in these cases if construction designs and documentation were complete at the time the Government of Moscow issued a decision to cancel the contract.

In most of the cases that were decided in favour of investors, those investors were able to provide courts with all the necessary documentary evidence of their expenses, including agreements, invoices, payment orders, and payment registers.

In any case it is up to investors to prove in court that they actually suffered the damages, the amount of those damages, the cause-and-effect relation between the violation and the damages, and the measures taken to avoid the damages; all of these factors are necessary to win the case. There is also a precedent in court practice of the Federal Arbitrazh Court of Moscow clarifying that investors have the right to claim compensation of damages not only if the results were passed to the violator of the obligations according to Article 15 of the Civil Code of the Russian Federation, but also if there are no completed results and construction is still underway.

Considering the aforesaid, such claims against the Government of Moscow are very difficult to prove in court and investors do risk losing a claim on compensation for expenses and damages. However, there are ways to work out a well-reasoned judicial position, and the positive practice seen in recent years is hopefully becoming more unified.

*Article by: Diana Solopchenko, Associate at Yukov, Khrenov and Partners Law Firm, October 2012.*