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THE PRESIDIUM OF THE SUPREME ARBITRATION COURT OF THE RUSSIAN FEDERATION (THE SAC OF THE RF) SUPPOSEDLY ADDRESSED THE LEGAL NATURE OF THE INVESTMENT CONTRACTS AND THE «CITY SHARE»

Ruling of the Presidium of the RF Supreme Arbitration Court No. 12444/12 dated 2/5/2013 (published on May 07, 2013)

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The peculiarity of implementing any investment project in capital construction is that the developer performing the construction has to interact with the public legal institution (municipality, constituent entity of the RF) administering the state-owned land, permitting construction and commissioning the completed facility. Frequently such contacts are regulated by a contract made between the developer and the public entity; such a contract is usually called an investment contract.

The SAC of the RF turned to the issue of investment contracts in capital construction in Ruling No. 54 by the Plenum, dated July 11, 2011, where it pointed out that, in the course of investigating conflicts arising from contracts related to investment in construction financing or real estate objects renovation, it is necessary to establish the legal nature of such contracts and resolve the conflict by the ruled of purchase and sale, labor contract, cooperation etc.

Meanwhile, structuring investment contracts based on the models of simple partnership, labor contracts or sale of the future real estate is characteristic for contracts made between commercial entities (less frequently - individuals whose participation in construction financing is regulated by special legislation). However, contracts involving public entities, as a rule, do not correspond to any model suggested by the SAC Plenum in Ruling No. 54 dated July 11, 2011.

Under such contracts, the developer, as a rule, hands over to the public entity part of the facilities in the completed building or pays a certain amount (sometimes referred to as contribution for infrastructure development). In its turn, the government or municipal body commits to create the required conditions for the implementation of the project, namely - fulfilling the functions vested in it by law and related to providing a site for construction, issuing the permits etc.

In Ruling No. 5495/11 dated October 11, 2011, the Presidium of the SAC of the RF supported the legal position by which the absence in the civil legislation of provisions regulating payment for the right of developing land lots and participation of economic entities in the financing of the development of engineering infrastructure in a municipal entity, does not preclude them from participation therein voluntarily, based on contracts.

In the meantime, qualifying an investment contract made by a local government, as part of another case, the Presidium of the SAC of the RF, in its Ruling No. 17043/11 dated April 03, 2012, concluded that the obligations stipulated by an investment contract (to transfer the land lot by the set procedure; ensure preparation and timely acceptance of the administration documents; ensure the availability of the required capacity in the city grids, as of the moment of the facility commissioning etc.) are of public law, immediately related to the governance and administrative functions of the municipal entity bodies and do not constitute civil obligations.

On November 19, 2012, the SAC board of judges submitted to the Presidium Case No. A32-24023/2011, suggesting that the contract made between the city administration and the investor be qualified as a donation contract. If the Presidium had agreed with the suggestion, this would have resulted in very negative tax implications for the developers, as donations are made from the entity's profit and cannot be accounted for as construction costs. Fortunately, the Presidium of the SAC in its Ruling No. 12444/12 dated February 05, 2013, did not agree with such qualification of payments under the investment contract (to be more specific, it did not interpret them as such).

In the above Ruling, the Presidium confirmed the position previously stated in Ruling No. 5495/11, that making a contract between a public entity and a developer, under which the developer transfers to the public entity part of the constructed facility or pays a certain amount of money, does not contradict the current laws. Besides, the Presidium confirmed the position formulated in Ruling No. 17043/11 dated April 03, 2012, according to which the public functions of a state authority or a local authority are not civil obligations (this conclusion can be made from Ruling No. 14760/11 dated April 03, 2012, by the Presidium of the SAC of the RF, under which an investment contract cannot serve as grounds for giving to the investor a land lot for construction).

Thus, in the considered Ruling the Presidium confirmed the possibility of making the contract containing elements of a civil transaction resulting in civil obligations, and a public agreement not resulting in such obligations.

Based on that, we may suppose that the interests of a public entity under contracts on the implementation of

investment projects related to receiving the due shares in completed facilities or amounts of money shall be protected by private law means in adversary proceedings. This conclusion is confirmed by the position of the Presidium of the SAC of the RF stated in Ruling No. 11450/11 dated January 24, 2012, in which the court qualified the requirement of the Government of Moscow, which is a party to the contract, regarding the transfer thereto of real estate constructed during the investment project implementation, as a requirement to fulfill the contract. In turn, the interests of the investors under such agreements, related to a public entity practicing its powers of authority, are subject to protection, respectively, by public law means, by disputing unlawful resolutions (actions/failures to act) of state authorities or local authorities. On the one hand, such a procedure provides for the burden of proof to be put of the public entity, on the other hand - reduced periods of the claimant turning to court, which must be paid attention to.

Losses incurred by the investor due to the public entity's failure to perform the functions vested therewith, are to be collected not as liability for violation of a contractual term (art. 393 of the Civil Code of the Russian Federation), but as damages (art. 1069 of the Civil Code of the Russian Federation).

In any case, while commencing to implement a project, an investor should adequately evaluate entrepreneurship risks related to incurring costs (including pre-project development, research, marketing etc.), before the rights to the land lot are acquired.

In conclusion it should be noted that, while permitting the making of such contracts from the viewpoint of the principle of freedom of contracts, the Presidium of the SAC of the RF gives no answer as to whether a public entity acting on its authority of power may be the result of the developer (voluntarily) assuming a civil obligation (in particular, to transfer money or facilities).

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