

The Russian Supreme Court's guidelines on private international law

The Russian Supreme Court has published the English translation of the guidelines on Russian private international law, issued in Russian on 27 June 2017 (ruling No 23 'On Consideration by Commercial Courts of Economic Disputes Involving Cross-Border Relations').

The ruling is binding on all the lower courts in Russia: from time to time the Russian Supreme Court gathers in a plenary session to discuss the case law approaches to controversial matters in a particular field of law. It then adopts binding guidelines to ensure a uniform application of law in the future (this role of the Supreme Court is based on art. 126 of the Constitution and arts. 2 and 5 of the law on the Supreme Court of the Russian Federation of 2 February 2014).

The 2017 guidelines are based on more than a decade of case law, as the previous plenary session on private international law was dated 2003.

The guidelines, briefly sketched below, are divided to seven parts, dedicated to the general issues (1), the international jurisdiction of the Russian commercial courts (2), the law applicable to corporation (3), the service of documents (4), the requirements relating to the consular legalisation of foreign documents (5), the application of foreign law (6) and the provisional protective measures (7).

1. In the first part of the guidelines, the Supreme Court explains which disputes have an international character (at [1]). It also recalls the rules on absolute (international) and relative (national) jurisdiction (at [1], further detailed at [8]).

2. Part two is dedicated to the international jurisdiction of Russian commercial courts.

- The Supreme Court lists the matters within the exclusive jurisdiction of the Russian commercial courts (at [5]). If a foreign court accepts jurisdiction in violation of the rules on exclusive jurisdiction of Russian commercial courts, the foreign decision will not be recognised or enforced in Russia (at [4]).

- Several guidelines deal with the choice of court. Parties may choose a court in relation to an existing or a future dispute arising out of any relationship, be it contractual or non-contractual (at [6]). Some substantive and formal requirements relating to the choice of court agreement, including tacit submission, are discussed in detail. Two foreign parties may choose a Russian commercial court. Parties may choose to litigate at the 'court of the defendant' or 'the court of the claimant' (last four paragraphs of [6], [7]-[9], [11] and [18]). The principle of party autonomy in relation to the choice of court is also emphasised later in the guidelines (at [17]; especially in the third paragraph).

- The guidelines confirm the severability of the court choice clause (at [10]), the survival of such clause after the termination of the contract and declaring contract invalid (at [10]), and touch upon the *lis pendens* with a foreign court (at [11]).

- The Supreme Court recalls the principle of close connection underpinning the rules on the jurisdiction of the Russian courts. It then names a number of factors to be assessed in order to establish a close connection between the dispute and Russia (at [13]-[16]). For this purpose, the concept of activity in Russia is not confined to the registration of an affiliate or a registered office in the Russian trade register. Any activity in Russia should be taken into consideration. It may be, for example, the use of a website with a domain name '.ru' or '.su' to approach the Russian market (at [16]).

3. The third part of the guidelines is dedicated to the law applicable to corporations. After recalling that the Russian conflict of laws rules rely on the theory of incorporation (at [19], third paragraph), the Supreme Court explains which documents should be filed with the court (or consulted by the court of its own motion) to identify the country of a company's incorporation (at [19]). Failure of the first or second instance court to establish this constitutes a ground for cassation (at [22], last paragraph). The Supreme Court also discusses the law applicable to some aspects of company's representation (at [20]-[25]).

4. The fourth part of the guidelines deals with the service of documents (at [26]-[28]): the service of foreign documents on a Russian party, the service of Russian documents on a foreign party, and the relevant procedural terms (at [29]-[31]).

Two points are worth noting. First, if several international instruments on

international legal cooperation containing requirements relating to the service of documents apply, the instrument allowing the fastest and the most informal service prevails (at [28]).

Second, the awareness of a foreign party of the proceedings is presumed, if the court publishes the information about the time and the place of the hearing on its website (at [37]; let us note, most information on the websites is in Russian). In the meantime, a broad range of evidence may be presented to prove awareness of the proceedings on the part of the foreign party (at [36]).

5. Part five discusses the requirements of apostille and consular legalisation of foreign documents (at [39]-[41]).

6. Part six deals with the application of foreign law. If a dispute is governed by a foreign law, Russian commercial courts have the duty to apply foreign law (at [42]). The parties have no obligation to inform the court on the content of foreign law. However, the court may require a party to do so. If the party does not comply, it may not invoke the court's failure to establish the content of foreign law later in the proceedings, provided that the court takes reasonable measures to establish the content of foreign law (at [44]). The guidelines contain some general recommendations for the lower courts on the way to take such measures (at [45]-[46]).

7. Part seven is dedicated to provisional protective measures.

- A provisional protective measure can be taken by a Russian court if it has 'effective' jurisdiction regarding the measure. The Supreme Court describes situations in which a Russian court has 'effective' jurisdiction (at [49]).
- The enforcement of a provisional protective measure granted by a foreign court falls outside the scope of instruments regulating international legal cooperation (at [50]).
- A foreign antisuit injunction cannot prevent a Russian commercial court from hearing the dispute, if the Russian court finds that it has jurisdiction regarding the dispute (at [52]).