

UDC 330

Zaytseva L.I.

Influence of judicial practice on the development of investment and construction sector and ensuring conflict-free project realization

In the current conditions of sanctions pressure and crisis phenomena, state regulation measures in the investment and construction sector should be aimed at preventing and eliminating contradictions and disputes between business entities, that is, the effectiveness of such measures must be assessed based on the ability to ensure conditions for conflict-free construction. At the same time, the concept of "conflict-free" does not mean the absence of disputes as such, but refers to the most constructive approaches to resolving disagreements, taking into account the interests of the participants in the relationship and the development priorities of the system as a whole. Of particular importance in achieving this goal is the activity of the judiciary in the field of forming a uniform judicial practice, focused on development priorities, as well as the application of judicial assistance technologies in the use of conciliation procedures in relation to construction disputes. Thus, the most significant recently developed positions relate to the extension of framework that is absent in the legislation, the interpretation of contract terms, the use of support measures and anti-sanction regulations, the peculiarities of bringing to responsibility for violation of urban planning standards and the consequences of non-compliance with mandatory requirements at the starting phase of the project. Analysis of approaches developed in judicial practice allows to identify risks associated with the implementation by public bodies (the prosecutor's office) of control and supervision functions. Assistance in the use of conciliation procedures, in turn, allows parties to use more flexible formats aimed at finding a mutually acceptable solution to a conflict situation within the court. At the same time, the problem of participation of public bodies in conciliation procedures remains relevant, significantly reducing their effectiveness. **Keywords:** *judicial practice, conflict-free construction, government regulation measures, conciliation procedures, project mediation*



Zaitseva Larisa Igorevna,
Candidate of Law Sciences,
Associate Professor, Associate
Professor of the Department of
Investment and Construction Busi-
ness and Real Estate Management;
Institute of Industry Manage-
ment of the Russian Presidential
Academy of National Economy
and Public Administration (IIM
RANEPA); bldg. 1, 82 Vernadsky
avenue, Moscow, 119571,
Russian Federation; ID RSCI:
1027747, Scopus: 57194457897,
ResearcherID: P-9941-2019,
ORCID: 0000-0002-8325-4342;
zaytseva-li@ranepa.ru

The main criterion that determines the effectiveness of state regulation measures in the investment and construction sector is the ability to provide conditions for conflict-free construction. In the context of modern challenges, "absence of conflict" is transformed into the ability to resolve disagreements and eliminate contradictions in the most constructive manner, taking into account the interests of the participants in the relationship and the development priorities of the system as a whole. That is, this concept does not mean the absence of disputes and conflicts (their occurrence is inevitable, especially in difficult, complex realities), but the creation of mechanisms that help to eliminate the destructive element, ensuring the most effective way out of a conflict situation (if it arises) and, as the option of highest priority — preventing escalation of contradictions between disputing parties [1].

One of the conditions of conflict-free construction is the practice-oriented activities of the judiciary, which is formed taking into account the sectoral approach which performs, among other things, a regulatory function. In addition to basically resolving disputes, the courts form approaches set out in judicial acts (especially district courts and the Supreme Court of the Russian Federation), which perform the functions of contradictions elimination in current regulations (regarding specific usage of norms in particular legal relations) and filling in gaps, including extension of framework (notions, principles etc.).

As an example, we can refer to the concept of "construction in progress", which is not defined in legal acts, but at the same time its features are indicated in the resolution of the Plenum of the Supreme Court of the Russian Federation dated June 23, 2015 No. 25 "On the application by courts of certain provisions of Section I of Part One of the Civil Code of the Russian Federation". In accordance with section 38, when resolving issues of recognizing as an immovable thing of an object being legally under construction (an object of construction in progress), it is necessary to establish that at least the groundwork construction or similar works have been fully completed (clause 1 of Article 130 of the Civil Code of the Russian Federation). Paving of a land plot that does not meet the characteristics of a structure is part of it and cannot be recognized as an independent immovable thing (clause 1 of Article 133 of the Civil Code of the Russian Federation)¹.

In addition, currently judicial practice is being actively developed on disputes related to use of anti-sanction measures of support to the construction industry, in particular with the use of moratorium on the imposition of financial sanctions as an anti-crisis tool aimed at minimizing the consequences of the sanctions regime and ensuring the stability of the state's economy. In one of the cases (No. A40-78279/2022), it was concluded that such an instrument is subject to application to both monetary and non-monetary obligations, namely, the transfer of an object

¹ On the application by courts of certain provisions of Section I. Part One of the Civil Code of the Russian Federation : Resolutions of the Plenum of the Supreme Court of the Russian Federation dated June 23, 2015 No. 25. URL: <https://vsrf.ru/documents/own/8435/> (accessed: 10.30.2023).

▶ in proper condition and on time. Let us recall that this moratorium was provided for by Decree of the Government of the Russian Federation dated March 28, 2022 No. 497 and was valid until October 1st, 2022².

Taking into account the large-scale regulation in the field of crisis management, it is possible to predict a significant number of disputes that will arise in connection with the use of anti-sanctions measures. In this regard, the approaches of the judiciary will serve as an important guide in practical activities.

The practice-influencing approaches which have been developed in the last few years by the Supreme Court of the Russian Federation in relation to urban planning activities include.

Regarding contracts related structures:

- the conclusion that the identification of real legal nature of a contract should be based on the actual type of obligations and the characteristics of certain types of contracts provided for by law, regardless of the title indicated by parties, their description, as well as the specification of performance method. Interpretation of contractual terms, which may lead to the extraction of unjustified advantage by one of the parties due to the ambiguity of the wording proposed by it, is unacceptable. If there is a valid contract, the date of transfer of advance payment for the completion of work is not the moment when the limitation period begins to run;
- if the contract provides for the right to withhold penalties and other sums due to the contractor, it is necessary for the court to establish whether there is a delay in fulfilling obligations in disputes regarding the collection of funds for work performed. The pre-court claim procedure of dispute resolution is aimed at its prompt resolution and serves as an additional guarantee for protection of rights, and therefore the deadline for filing a suit established by contractual terms is not preclusive and does not entail any consequences for the parties;
- when a contract specifies the maximum degree of a contractor's liability, the amount of penalty for violating the deadlines for completing work cannot exceed such degree, taking into account that the procedure for determining the amount of the penalty agreed upon by the parties does not conflict with any express legislative prohibition and does not violate the essence of legislative regulation of relations under construction contract, or particularly significant interests protected by law and does not lead to a gross violation of parties balance of interests;
- the presence of an supplemental agreement on changing the timing of work performance does not exclude the possibility of terminating the contract by the customer on the ground of violating deadlines by the contractor before conclusion of supplemental agreement, if these violations were systematic.

Regarding prosecution for violation of urban planning regulations:

- on application of Article 9.5 of the Code of Administrative Offenses of the Russian Federation (violation of the established procedure for construction, reconstruction, major repairs of a capital construction project, its commissioning): the presence of a judicially confirmed ownership of a real-estate object does not grant the right to operate it after reconstruction without obtaining permission to put the facility into operation in the prescribed manner;
- prosecution under Part 1 of Article 9.4 of the Code of Administrative Offenses of the Russian Federation (violation of

mandatory requirements in the field of construction and use of building materials) does not exclude the accrual of a penalty under the contract for similar violations;

- the possibility of being held accountable under Article 6.7 of the Code of Administrative Offenses of Moscow (violation of the permitted use of a land plot) in the event of the acquisition of an object after its reconstruction, which led to a violation of the requirements and restrictions on the use of the land plot.

It seems that the disputes with the highest degree of conflict are those that have the greatest relevance for jurisprudence, which have the effect of "leveled value" and retroactive effect: when, despite the prospects of the project and receipt of all necessary approvals, proceedings are initiated leading to the freezing of the project and further demolition of the already constructed objects (for example, recognition of construction authorizations as illegal) by the initiative of regulatory authorities. At the same time, the rights of final buyers investing in future properties at the early stages are significantly violated [2].

One should not forget that the lack of initial planning permits in itself cannot serve as a basis for the demolition of an unauthorized construction site. The determining factor influencing the possibility of legalizing a building is compliance with safety requirements (no threat to the life and health of citizens) and the possibility of preserving the building (or restoring it to its original form). This is precisely the logic contained in the draft resolution of the Plenum of the Supreme Court of the Russian Federation "On some issues arising in judicial practice when applying the rules on unauthorized construction".

The analysis of practice showed the presence of the following risks associated with the implementation by public bodies (prosecutor's office) of control and supervision functions:

- challenging a building permit after a significant period of time after commencement of construction;
- the possibility of taking by the court of interim measures in the form of a ban on construction work;
- recovery as the revenue into the budget of the damage related to inability to use the land due to its buildings, as well as due to damage to the soil layer during construction;
- foreclosure in favour of the Russian Federation on unfinished construction projects;
- invalidation of the lease agreement for a land plot, and, as a consequence, the need to vacate the land plot (in connection with the violation of the legally protected interests of the Russian Federation and of indefinite number of persons, for example, in connection with a change in the type of permitted use of the land and the conclusion of an additional agreement to the lease agreement, which may be regarded as granting a land plot for construction purposes, bypassing the procedure established by land legislation, taking into account paragraphs 2, 3 of the Review of the practice of consideration by courts of judicial cases related to changes in the type of permitted use of a land plot, approved by the Presidium of the Supreme Court of the Russian Federation on November 14, 2018, determination of the Judicial Collegium on economic disputes of the Supreme Court of the Russian Federation dated January 23, 2020 No. 305-ES19-18488³;
- non-application of the statute of limitations, since a transaction for the transfer of a land plot for rent may be considered

² On the introduction of a moratorium on the initiation of bankruptcy cases on applications submitted by creditors : Decree of the Government of the Russian Federation of March 28, 2022 No. 497 (as amended on July 13, 2022). URL: <http://publication.pravo.gov.ru/Document/View/0001202204010040> (accessed: 30.10.2023).

³ Review of the practice of courts considering cases related to changes in the type of permitted use of a land plot : approved by the Presidium of the Supreme Court of the Russian Federation on November 14, 2018. URL: https://www.consultant.ru/document/cons_doc_LAW_311024/ (accessed: 30.10.2023).

void (in accordance with paragraph 71 of the resolution of the Plenum of the Supreme Court of the Russian Federation dated June 23, 2015 No. 25 "On the application by courts of certain provisions of Section I of Part One of the Civil Code of the Russian Federation" a void transaction, unlike a contested transaction, is invalid regardless of whether it is recognized as such by the court [1]. The defendant's objection that the plaintiff's claim is based on a void transaction is assessed by the court on its merits, regardless of the expiration of limitation period for declaring this transaction invalid);

- inability to compensate losses incurred due to the freezing of a construction project if the construction company is found to be guilty of violating land, town planning, and environmental legislation. In such cases, the courts indicate that, with due care and prudence, the person should have foreseen negative consequences associated, for example, with a change in the type of permitted use in violation of the requirements of land legislation. Likewise, a person could not have been unaware of the prohibition by current legislation from constructing real estate in a certain area without conducting a state environmental assessment of project documentation and conducting archaeological field work.

It should be noted that in the event of an illegal refusal to issue permits by the authorized body, the judicial practice of collecting losses caused by such actions has not currently been developed:

- occurrence of direct losses due to liability to final buyers (investors) [3];
- finally, huge reputational costs, which question the possibility of further successful implementation of other projects. Moreover, there is a high probability of bankruptcy of the construction company due to the losses indicated above, including lost profits [4].

In addition, litigation on the nationalization of enterprises has become a trend over the past few years. Since 2020, the number of cases in which the Prosecutor General's Office challenges the results of privatization in the 90s has increased 8 times. In 2023, arbitration courts settled a record number of such disputes [5]. Moreover, in a number of cases, the initiation of the process of "renationalization" of strategic assets occurs due to the emergence of a conflict situation (as in the case of the "Bashkir Soda Company", the case became widely known due to large-scale protests by environmental activists).

Taking into account the identified aspects and features of the formation of judicial practice, the need for development and implementation of out-of-court methods of dispute resolution that can take into account the characteristics of a specific project becomes obvious [6]. We are talking, first of all, about *project mediation*, as well as *specialized dispute resolution commissions* (*Dispute Review Board (DRB)*). At the same time, members of such commissions should have experience not only in the field of dispute resolution, but also in the specific area of the project [7]. Resolution of disagreements with the participation of a commission is one of the most essential conditions of the contract (analogous to a mediation clause), which serves as a certain guarantee for the parties. A distinctive feature of DRB from other alternative methods of dispute resolution is the formation of the body at the early stages of project implementation, that is, before a dispute arises. Members of the commission are direct participants in the project, carry out

a kind of monitoring of its various stages, prevent the emergence of disagreements and, in case of escalation of contradictions, directly resolve the dispute [8].

However, "alternativeness", as such, does not mean that having initiated a dispute in court, the parties are deprived of the opportunity to use more flexible procedures aimed at finding a mutually acceptable way out of the conflict situation [9]. Thus, within the courts there is an option that allows to postpone the consideration of the case and try to conclude a mediation (settlement) agreement on the basis of the so-called "rooms for conciliation procedures". Moreover, this possibility remains in courts of various levels and has an important impact on the formation of a favorable business climate [10].

Thus, in addition to providing judicial practice that contributes to the sustainable development of construction industry, the task of the judiciary is to apply *technologies of judicial assistance in the use of conciliation procedures in relation to construction disputes*. The analysis showed that the vast majority of cases in which the mediation procedure was initiated in reconciliation rooms related specifically to the implementation of investment and construction projects. In all cases, the judges analyzed disputes from the point of view of *mediation potentials* (the main criterion for the possibility of concluding a settlement agreement) and explained the advantages of using alternative methods, such as mediation [11]. Cooperation with the College of Mediators at the Chamber of Commerce and Industry of the Russian Federation was also constructive in order to provide qualified services for carrying out this procedure⁴.

At the same time, the problem of involvement and participation of public bodies in conciliation procedures remains unresolved to date. Lack of awareness of the effectiveness of such procedures leads to the impossibility of fully unlock its potential and, as a result, leveling out the positive effect of collaborative models of interaction among project participants.

REFERENCES

1. Zaytseva L.I. *Alternative methods of dispute resolution in the context of interstate relations and economic justice in the Russian Federation: monograph*. Moscow, Original-maket Publ., 2015; 216. (rus.).
2. Kathleen M.J.H. *Conflicts between owner and contractors: Proposed intervention process*. *Journal of Management in Engineering*. 2003; 19(3):121-124. DOI: 10.1061/(ASCE)0742-597X(2003)19:3(121)
3. Hayati K., Latief Y. *Risk analysis and prevention system to minimize claim and dispute on construction projects*. *IOP Conference Series: Earth and Environmental Science*. 2019; 365(1):012030. URL: 10.1088/1755-1315/365/1/012030 (accessed: 30.10.2023).
4. Shash A.A., Habash S.I. *Disputes in construction industry: owners and contractors' views on causes and remedies*. *Journal of Engineering, Project, and Production Management*. 2021; 11(1):37-51. DOI: 10.2478/jeppm-2021-0005URL:https://www.researchgate.net/publication/348122604_Disputes_in_Construction_Industry_Owners_and_Contractors'_Views_on_Causes_and_Remedies (accessed: 30.10.2023).
5. Tselykh A. *The Prosecutor General's Office has set a record in cases of reviewing the privatization of the 90s. What do enterprises seized by the state have in common?* RTVI Production LLC. RTVI. 23.10.2023/12:12. URL: tories/genprokuratura-postavila-rekord-po-delam-o-peresmotre-privatizacii-90-h-chto-obshhego-u-predpriyatij-kotorye-izymaet-gosudarstvo/?ysclid=lo8z9emoh135440482 (accessed: 10/30/2023). (rus.).
6. Yaskova N.Y., Zaytseva L.I. *On the issue of ADR promotion in construction (on the basis of materials of III scientific and practical conference "non-judicial settlement of economic disputes in investment*

- and construction sphere"). *Economics of Construction*. 2019; 5(59):13-22. URL: <https://elibrary.ru/bhkltd> (rus.).
7. Senan M.H., Alzaghrini N., Srouf I. Mediation tactics and effectiveness in dispute resolution. *Responsible Design and Delivery of the Constructed Project*. 2018; 6. URL: https://www.researchgate.net/publication/326816391_MEDIATION_TACTICS_AND_EFFECTIVENESS_IN_DISPUTE_RESOLUTION (access date 30.10.2023).
8. Yaskova N.Y., Zaytseva L.I. Investigation of foreign experience of effective permission of economic disputes of enterprises. *Textile Industry Technology. Series: Proceedings of Higher Educational Institutions*. 2018; 4(376):128-135. (rus.).
9. Gaidenko Sher N.I. Alternative mechanisms for resolving disputes as a tool for creating a favorable environment for

- entrepreneurial activity (the experience of Russia and foreign countries) : monograph. N.G. Semilyutina (ed.). Moscow, INFRA-M Publ., 2016; 248. (rus.).
10. Zaytseva L.I. Conditions and prerequisites for the introduction of extrajudicial methods of resolving disputes in the investment and construction sector. *State Service*. 2019; 4(120):66-69. DOI: 10.22394/2070-8378-2019-21-4-66-69 (rus.).
11. Lu W., Li Z., Wan S. The role of justice for cooperation and contract's moderating effect in construction dispute negotiation. *Engineering, Construction and Architectural Management*. 2017; 24(1):133-153. URL: <https://www.proquest.com/docview/1857354447> (accessed: 30.10.2023).

Влияние судебной практики на развитие инвестиционно-строительной деятельности и обеспечение бесконфликтной реализации проектов

В сложившихся условиях санкционного давления и кризисных явлений меры государственного регулирования инвестиционно-строительной сферы должны быть нацелены на предотвращение и устранение противоречий и споров между хозяйствующими субъектами, т.е. действенность таких мер подлежит оценке исходя из способности обеспечить условия бесконфликтного строительства. При этом понятие «бесконфликтность» не означает отсутствие споров, как таковых, а относится к наиболее конструктивным подходам к урегулированию разногласий с учетом интересов участников отношений и приоритетов развития системы в целом. Особое значение в реализации указанной цели имеет деятельность судебных органов в области формирования единообразной ориентированной на приоритеты развития отрасли судебной практики, а также применения технологий судебного содействия в использовании примирительных процедур в отношении строительных споров. Так, наиболее значимые позиции, выработанные в последнее время, относятся к дополнению понятийного аппарата, отсутствующего в законодательстве, толкованию условий контрактов, применению мер поддержки и антисанкционного регулирования, особенностям привлечения к ответственности за нарушение градостроительных норм и последствиям несоблюдения обязательных требований на стартовой фазе реализации проекта. Анализ подходов, выработанных в судебной практике, позволяет выявить риски, связанные с реализацией публичными органами (прокуратурой) функций по контролю и надзору. Содействие в использовании примирительных процедур, в свою очередь, позволяет сторонам использовать более гибкие форматы, нацеленные на поиск взаимоприемлемого выхода из конфликтной ситуации, в рамках суда. Вместе с тем актуальной остается проблема участия публичных органов в примирительных процедурах, существенно снижающая их эффективность.

Ключевые слова: судебная практика, бесконфликтное строительство, меры государственного регулирования, примирительные процедуры, проектная медиация

СПИСОК ИСТОЧНИКОВ

1. Зайцева Л.И. Альтернативные способы разрешения споров в контексте межгосударственных отношений и экономического правосудия в Российской Федерации : монография. М. : Оригинал-макет, 2015. 216 с.
2. Kathleen M.J.H. Conflicts between owner and contractors: proposed intervention process // *Journal of Management in Engineering*. 2003. Vol. 19. Issue 3. Pp. 121–124. DOI: 10.1061/(ASCE)0742-597X(2003)19:3(121)
3. Hayati K., Latief F. Risk analysis and prevention system to minimize claim and dispute on construction projects // *IOP Conference Series: Earth and Environmental Science*. 2019. Vol. 365. Issue 1. P. 012030. URL: 10.1088/1755-1315/365/1/012030 (дата обращения: 30.10.2023).

4. Shash A.A., Habash S.I. Disputes in construction industry: owners and contractors' views on causes and remedies // *Journal of Engineering, Project, and Production Management*. 2021. Vol. 11. Issue 1. Pp. 37–51. DOI: 10.2478/jeppm-2021-0005 URL: https://www.researchgate.net/publication/348122604_Disputes_in_Construction_Industry_Owners_and_Contractors'_Views_on_Causes_and_Remedies (дата обращения: 30.10.2023).
5. Целых А. Генпрокуратура поставила рекорд по делам о пересмотре приватизации 90-х. Что общего у предприятий, которые изымает государство. ООО «ЭрТиВиАй Продакшн» // *RTVI*. 23.10.2023/12:12. URL: tories/genprokuratura-postavila-rekord-podelam-o-peresmotre-privatizaczii-90-h-cto-obshhego-u-predpriyatij-kotorye-izymaet-gosudarstvo/?ysclid=lo8zc9emoh135440482 (дата обращения: 30.10.2023).
6. Яськова Н.Ю., Зайцева Л.И. К вопросу внедрения внесудебных методов разрешения споров в строительстве // *Экономика строительства*. 2019. № 5 (59). С. 13–22. URL: <https://elibrary.ru/bhkltd>
7. Senan M.H., Alzaghrini N., Srouf I. Mediation tactics and effectiveness in dispute resolution // *Responsible Design and Delivery of the Constructed Project*. 2018. P. 6. URL: https://www.researchgate.net/publication/326816391_MEDIATION_TACTICS_AND_EFFECTIVENESS_IN_DISPUTE_RESOLUTION (дата обращения: 30.10.2023).
8. Яськова Н.Ю., Зайцева Л.И. Исследование зарубежного опыта эффективного разрешения хозяйственных споров предприятия // *Известия высших учебных заведений. Технология текстильной промышленности*. 2018. № 4 (376). С. 128–135.
9. Гайдаенко Шер Н.И. Альтернативные механизмы разрешения споров как инструмент формирования благоприятной среды для предпринимательской деятельности (опыт России и зарубежных стран) : монография / отв. ред. Н.Г. Семилутина. М. : ИНФРА-М, 2016. 248 с.
10. Зайцева Л.И. Условия и предпосылки внедрения внесудебных способов разрешения споров в инвестиционно-строительной сфере // *Государственная служба*. 2019. № 4 (120). С. 66–69. DOI: 10.22394/2070-8378-2019-21-4-66-69
11. Lu W., Li Z., Wang S. The role of justice for cooperation and contract's moderating effect in construction dispute negotiation // *Engineering, Construction and Architectural Management*. 2017. Vol. 24. Issue. 1. Pp. 133–153. URL: <https://www.proquest.com/docview/1857354447> (дата обращения: 30.10.2023).

Об авторе: **Зайцева Лариса Игоревна** — кандидат юридических наук, доцент кафедры инвестиционно-строительного бизнеса и управления недвижимостью; **Институт отраслевого менеджмента Российской академии народного хозяйства и государственной службы при Президенте Российской Федерации (ИОМ РАНХиГС)**; 119571, г. Москва, пр-т Вернадского, д. 82, стр. 1; РИНЦ ID: 1027747, Scopus: 57194457897, ResearcherID: P-9941-2019, ORCID: 0000-0002-8325-4342; zaytseva-li@ranepa.ru.

For citation: Zaytseva L.I. Influence of judicial practice on the development of investment and construction sector and ensuring conflict-free project realization. *Real Estate: Economics, Management*. 2023; 4:69-72.

Для цитирования: Зайцева Л.И. Influence of judicial practice on the development of investment and construction sector and ensuring conflict-free project realization // *Недвижимость: экономика, управление*. 2023. № 4. С. 69–72.