



## NINETEENTH ARBITRAL OF APPEAL COURT

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### statement

14 Sept 2018  
Voronezh

case №A14-8464/2015

The operative part of the resolution was announced on September 11, 2018. The resolution was issued in full on September 14, 2018.

Nineteenth Arbitration Court of Appeal consisting of:  
Presiding Judge S.I. Written,

judges Korovushkina E.V.,

Mokrousova L.M., while keeping the minutes of the court session by the secretary of the court session Berezkin A.E.,

with the participation:

from the limited liability company "Company" ALS and TEK ":  
Puzyrev E.G., representative by power of attorney w / o from 14.11.2017;

from the joint-stock company firm "SMUR": Galichenko A.A., representative by power of attorney No. 65 dated 07/30/2018; Tatarovich I.A., lawyer, certificate No. 0816 dated December 27, 2002, power of attorney No. 27 dated January 26, 2017;

from the Limited Liability Company "Long-distance International Telephone Station": Poretskov A.V., a representative by power of attorney No. 20 dated September 18, 2017;

from the joint-stock company RetnNet: the representative did not appear, the evidence of proper notification is in the case;

Having considered in open court the appeals of the limited liability company "Company" ALS and TEK "(OGRN 1026402661108, TIN 6452045336) and the limited liability company" Intercity International Telephone Station "(OGRN 1056405053352, TIN 6452913127), which applied as an article

42 of the Arbitration Procedure Code of the Russian Federation, against the decision of the Arbitration Court of the Voronezh Region dated 01/09/2018 in case No.A14-8464 / 2015 (judge Bobreshova A.Yu.) on the claim of the joint-stock company firm "SMUR" (OGRN 1023601610878, INN 3662020332) against a limited liability company "Company" ALS and TEK "on termination of the contract of sale and on the collection of 8 782 766.13 rubles. unjust enrichment, 878,276.61 rubles. penalties, with the participation of a third party in the case: RetnNet Joint Stock Company,

installed:

joint-stock company firm "SMUR" (hereinafter - the plaintiff, JSC firm "SMUR") applied to the Arbitration Court of the Voronezh Region with a claim against the limited liability company "Company" ALS and TEK "(hereinafter - the defendant, LLC "Company" ALS and TEK ") on the termination of the sale and purchase agreement and on the recovery of 10,741,873.77 rubles, including: 8,782,766.13 rubles.

unjust enrichment, 1,092,692.50 rubles. forfeit, 866,415.14 rubles. interest for the use of other people's funds, with interest accrued on the day of actual fulfillment of monetary obligations.

On the basis of Article 51 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the Arbitration Procedure Code of the Russian Federation), the regional court brought a joint-stock company

"RetnNet" (hereinafter - the third party, JSC "RetnNet").

In accordance with Article 49 of the Arbitration Procedure Code of the Russian Federation, by a ruling dated November 20, 2017, the regional court granted a petition to clarify the claims, according to which the plaintiff asked to terminate the contract No. on the territory of the Voronezh and Saratov regions from 09/10/2012 between JSC firm "SMUR" (buyer) and LLC "Company" ALS and TEK "(seller):

regarding the alienation to the buyer of 4 OV of standard G.652 and 4/64 of a share in the right of common share ownership of the sheath, protective and power elements of an optical cable, couplings, crosses in the Ershov-Ozinki FOCL;

in terms of alienation to the buyer of 4 OV of standard G.652 and 4/72 of a share in the right of common share ownership of the sheath, protective and power elements of an optical cable, couplings, crosses in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling of ORTPTS in Tellermanovskiy, Gribanovsky district Voronezh region to the M1 coupling at the automatic telephone exchange of OJSC Rostelecom, Borisoglebsk, st. K. Marx, 76;

and collect from LLC "Company" ALS and TEK "in favor of JSC firm

"SMUR" prepayment for goods: funds transferred in pursuance of contract No. 3 / 12-12 for the purchase and sale of optical fibers and a share in the right of common share ownership in a fiber-optic communication line on the territory of the Voronezh and Saratov regions dated 09/10/2012, in the amount of 8 782 766.13 rubles, of which:

regarding the alienation to the buyer of 4 OV of the G.652 standard and 4/64 of the share in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the Ershov-Ozinki FOCL, in the amount of 8,360,443.12 rubles. ;

in terms of alienating to the buyer 4 OFs of standard G.652 and 4/72 of a share in the right of common share ownership of the sheath, protective and power elements of an optical cable, couplings, crosses in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling ORTPTS in Tellermanovskiy settlement

Gribanovsky district of Voronezh region to the M1 coupling at the automatic telephone exchange of OJSC

Rostelecom, Borisoglebsk, st. K. Marx, 76, in the amount of 422,323.01 rubles;

and also collect 878,276.61 rubles. forfeits from 03/20/2014 to 10/09/2017 and RUB 77,305.21 the cost of paying the state fee.

By the decision of the Arbitration Court of the Voronezh Region dated 01/09/2018

in case No.A14-8464 / 2015, the claims were satisfied in full, and also from the defendant in favor of the plaintiff, court costs incurred to pay for the examination of the case in the amount of RUB 900,000 were collected, and in favor of the expert institution 367 399 rubles. expenses related to summoning an expert to the court session, as well as giving written explanations. The state duty in the amount of 3,676.33 rubles was returned to the plaintiff from the federal budget.

Disagreeing with the adopted judicial act, referring to its illegality and groundlessness, LLC "Company" ALS and TEK "filed an appeal with the Nineteenth Arbitration Court of Appeal, in which it asks the decision of the court of first instance to cancel and adopt a new judicial act on the case. the claim.

By the definition of the Nineteenth Arbitration Court of Appeal dated 12.03.2018, the appeal of LLC "Company" ALS and TEK "was accepted for proceedings by the court of appeal.

The consideration of the complaint was postponed to make a decision on appeals against the contested judicial act of the court of first instance, filed in accordance with Article 42 of the APC RF by other persons: LLC

MMTS, OOO Konteks, OOO SA Classic.

By the decision of the Nineteenth Arbitration Court of Appeal dated May 24, 2018, the appeal of MMTS LLC, filed in accordance with Article 42 of the Arbitration Procedure Code of the Russian Federation, was accepted for proceedings.

By the determination of the Nineteenth Arbitration Court of Appeal dated 20.06.2018, the appeal of OOO Konteks was returned on the basis of clause 5 of part 1 of Article 264 of the Arbitration Procedure Code of the Russian Federation due to the failure to eliminate the circumstances that served as the basis for leaving the appeal without progress, within the time period established in the court ruling.

By the determination of the Nineteenth Arbitration Court of Appeal dated 08/30/2018, the appeal of LLC SA Classic was returned on the basis of paragraph 5 of part 1 of Article 264 of the Arbitration Procedure Code of the Russian Federation due to the failure to eliminate the circumstances that served as the basis for leaving the appeal without movement, within the time period specified in the court ruling ...

At the court session of the appellate instance, additional explanations of the applicants of the appeals, responses to the appeals were added.

At the hearing of the appellate instance, the representative of JSC

RetnNet did not show up. Given that the court has evidence of proper notification of the third party about the time and place of the trial, the complaints are considered in the absence of his representative in accordance with Articles 123, 156 of the Arbitration Procedure Code of the Russian Federation.

The representative of the defendant supported the arguments of the appeal, asked for the decision of the first instance court to cancel and to adopt a new judicial act on the refusal to satisfy the claim.

The representative of the plaintiff in the court session and the submitted responses and explanations to the satisfaction of the complaints objects, considers the decision of the first instance court to be lawful and justified, asks to keep it in force, and the complaints are not satisfied.

The third party representative supported the arguments presented in the submitted review.

The representative of MMTS LLC supported the arguments of his complaint and

the complaint of the defendant.

The legality and validity of the judicial act, the correctness of the application by the arbitration court of first instance of the norms of substantive and procedural law were verified by the arbitration court of the appellate instance in accordance with the provisions of Articles 266, 268 of the Arbitration Procedure Code of the Russian Federation.

Having studied the arguments of the appeals and responses to them, re-examining and evaluating in the aggregate all the evidence in the case materials, having heard the explanations of the representatives of the persons participating in the case, the court of appeal finds no grounds for considering the appeal of MMTS LLC, and the appeal LLC "Company" ALS and TEK "considers justified, in this connection, the decision of the court of first instance is subject to cancellation on the following grounds.

As follows from the case materials, on June 14, 2012 between CJSC

RetnNet (the seller) and ALS and TEK Company LLC (the buyer) entered into a purchase and sale agreement No. RN-414/2012, according to which the seller undertakes to transfer the ownership of the buyer, and the buyer undertakes to pay and accept the property: 8 optical fibers (OF) of the G.655 standard and 8 OFs of the G.652 standard in the fiber-optic communication line (FOCL) in accordance with the list, in accordance with Appendix No. 1 to this Agreement.

At the same time, the parties determined that FOCL is a fiber-optic communication line consisting of a fiber-optic cable (FOC) containing at least 8 optical fiber of the G.655 standard and 8 optical fiber of the G.652 standard, connecting the optical distribution frame installed on the territory of ORTPTS Ershov, Saratov region and an optical distribution frame installed in the OUP Ozinki of the Saratov region, optical couplings and optical crosses for various purposes and line-cable structures (LKS) designed to accommodate FOC, optical crosses and couplings. FOCL route - the path of the fiber optic cable in the ground or in the LCS in accordance with the design documentation from the optical crossbar on the territory of the ORTPTS in Ershov, Saratov region to the optical crossbar in the OUP Ozinki (51 ° 14'34 "C 49 ° 45'12" E)

According to the act of transfer and acceptance of optical fibers dated June 14, 2012, the requirements under the sales and purchase agreement No. RN-414/2012 dated June 14, 2012

executed in full and meet its conditions. Ltd

"The company" ALS and TEK "has accepted optical fibers from CJSC" RetnNet "according to the Statement of the transferred property (Appendix No. 1 to this act of transmission and reception of optical fibers), including 8 optical fibers in the module natural color: No. 57 blue, No. 58 orange, No. 59 green, No. 60 brown, No. 61 gray, No. 62 white, No. 63 red, No. 64 black. Section length (optical) 118.479 km each. The type of FOC is indicated - DKP-7-6-6 / 64.

Also, on June 14, 2012, between RetnNet CJSC (seller) and SMUR CJSC (buyer), a sale and purchase agreement No. RN-437/2012 was concluded, according to which the seller undertakes to transfer the optical fibers (OV) to the buyer's ownership designed for the purpose of transmitting communication signals. A detailed route for the passage of the OV, technical characteristics, and other data that make it possible to definitely establish the OV to be transferred into the ownership of the buyer are indicated in Appendix No. 1 (clause 2.1 of the contract).

According to the Certificate of Acceptance and Transfer of OV to the ownership

under the sales and purchase agreement No. RN-437/2012 dated June 14, 2012, RetnNet CJSC on June 14, 2012 transferred SMUR CJSC into ownership, and SMUR CJSC took Ershov ORTPTS RetnNet container - Ozinki RetnNet container in the module, natural color, two OVs: pink color # 55 and aqua color # 56, optical length of each is 118.479 km. The buyer checked, in accordance with the procedure established by this agreement, the quality, quantity and identifying signs of the OM transferred to the buyer's ownership. The type of optical cable is not specified by the parties in the agreement.

With an additional agreement to the purchase and sale agreement No. RN-437/2012 dated 14.06.2012, signed on 03.03.2014, RetnNet CJSC and SMUR CJSC supplemented the contract, including paragraph 1.13: Property - 2/64 shares in the right of common share ownership of the Ershov-Ozinki fiber-optic communication line (FOCL), alienated by the seller to the buyer under the contract, actually consisting of 2 (two) optical fibers of the G.655 standard in a fiber-optic cable (FOC), identifying features of which are specified in Appendix No. 1 to the contract, as well as 2/64 shares in the right of common share ownership of the sheath, protective and power elements of a fiber-optic cable, couplings, optical crosses and other structural elements of FOCL.

September 10, 2012 CJSC firm "SMUR" (buyer) signed with LLC "Company" ALS and TEK "(seller) agreement No. 3 / 12-12 purchase and sale of optical fibers and a share in the right of common ownership in a fiber-optic communication line on the territory of the Voronezh and Saratov regions of 04.09.2012 (hereinafter - contract No. 3 / 12-12).

Agreement No. 3 / 12-12 defines the terms and abbreviations used in it, including:

Fiber-optic communication lines (FOCL) are a type of communication line in which information is transmitted through optical dielectric waveguides, known as optical fiber. In this

The agreement under the FOCL means the communication line Saratov-Ozinki in the territory of the Saratov region, a section of the FOCL in the Voronezh region.

Physical circuit - optical fibers (OF) that form a guiding medium for the transmission of telecommunication signals. Each optical fiber is an independent physical circuit.

Fiber optic cable (OC) - a set of optical fibers (OF) in a special outer sheath (armor).

Share - a share in the right of common share ownership of the sheath, protective and power elements of an optical cable, proportional to the ratio of the number of optical fibers purchased by the buyer to the number of optical fibers at each of the OK sites.

According to clause 1.1 of contract No. 3 / 12-12, the buyer undertakes to pay and take ownership, and the seller undertakes to transfer the following property into the ownership of the buyer after payment:

- four OVs of the G.652 standard and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable (OC), couplings, crosses in the Borisoglebsk-Rogachevka FOCL in the section from the

M2A coupling of the ORTPTS in the settlement of Tellermanovsky, Gribovsky district Voronezh region to the M1 coupling at the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km (subparagraph 1.1.1);

- four OV of the G.652 standard and 4/64 shares in the right of common share ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km (Subclause 1.1.2);

Individualizing signs of the transferred property, as well as the route of passage of the FOC, the list of sections of the OV, the contractual price of the OV are indicated in the Statement of the transferred property (Appendix No. 1 to contract No. 3 / 12-12) (Subclause 1.1.3).

In accordance with clause 1.3 of contract No. 3 / 12-12, the transfer of property from the seller to the buyer, first for temporary use, and then into ownership is carried out according to the acts of acceptance and transfer of property signed by the parties.

According to clause 2.2.1 of agreement No. 3 / 12-12, the seller undertakes to transfer the property to the buyer under the conditions specified in this agreement in a technically sound condition that allows them to be operated according to the purposes provided for in this agreement. OV must comply with the current standards and requirements for this type of OV. The transfer of OM must be made in the manner and terms stipulated in this contract, in accordance with the procedure for transfer of OM in accordance with Appendices No. 3 and No. 4 to this Agreement. The seller's obligations to transfer property are deemed to have been fulfilled from the moment the parties sign the Act of acceptance and transfer of property into ownership.

Clause 2.5 of contract No. 3 / 12-12 stipulates that the buyer has the right in case of a significant violation of the requirements for the quality (technical characteristics) of the OM: detection of fatal deficiencies, deficiencies that cannot be eliminated without significant costs and time, or are revealed repeatedly, or manifest again after their elimination and other similar shortcomings, or in the case of failure to provide the buyer with all the necessary documentation for the optical fiber in accordance with this contract, or in the event of such violations of the quality of optical fiber that do not allow the use of optical fiber for transmission of telecommunication signals and the provision of communication services the buyer has the right to demand the replacement of OV that do not meet technical requirements for similar property (OV), or completely refuse to fulfill this contract and demand the return of funds paid under this contract.

According to clause 3.7 of contract No. 3 / 12-12, payments and transfer of property, first for temporary use, and then into ownership, are made in stages in an agreed manner.

In particular, after the first payment in the amount of 25% of the value of the property, which is 4,630,052.95 rubles, plus 18% VAT in the amount of 833,409.53 rubles, according to the Act of acceptance and transfer of property for temporary use, the buyer accepts 4 OV in FOCL Saratov-Ozinki and in FOCL ORTPTS-

Borisoglebsk, specified in the Statement of property transferred for temporary use (Appendix No. 1 to contract No. 3 / 12-12).

After the buyer makes a second payment in the amount of 25% of the value of the property, which is 4 630 052.95 rubles, plus 18% VAT in the amount of 833 409.53 rubles, according to the Act of acceptance and transfer of property into ownership under stage I, the buyer accepts 4 OV in the fiber-optic communication line Borisoglebsk-Rogachevka in the section from the M2A clutch of the ORTPTs settlement Tellermanovsky, Gribovsky district of the Voronezh region to the M1 clutch of the automatic telephone exchange of OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76, and 4 OV in the fiber-optic communication line Saratov-Ozinki on the Ozinki-Ershov section, specified in the Statement of the transferred property in the ownership of stage I (Appendix No. 3 to contract No. 3/12-12).

After the buyer makes a third payment in the amount of 50% of the value of the property, which amounts to 9,260,105.90 rubles, plus 18% VAT in the amount of 1,666,819.06 rubles, the seller performs the procedure of acceptance and transfer of ownership to the buyer 4 OV in Fiber-optic communication lines Saratov-Ozinki on the Ershov-Saratov section specified in the Statement of the transferred property under the II stage (Appendix No. 5 to Agreement No. 3 / 12-12).

Simultaneously with the transfer of property into ownership, the seller transfers to the buyer the corresponding shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the Borisoglebsk-Rogachevka, Ershov-Ozinki, Saratov-Ershov FOCL.

Appendix No. 8 to contract No. 3/12-12, the parties agreed on technical requirements for property, which define the requirements for the optical parameters of the cable communication line, the requirements for the mechanical parameters of the communication cable, the requirements for the electrical parameters of the communication cable, the requirements for the composition, content and quality of documents, requirements for as-built documentation, requirements for operational documentation, requirements for acceptance tests of a cable communication line, as well as documents confirming the legitimacy of the placement of fiber-optic communication lines (FOCL) and the submission of technical documentation for fiber-optic communication lines to authorized bodies.

In particular, in the section Requirements for acceptance tests of a cable communication line, it is determined that when inspecting and checking a cable communication line, an external examination of a cable communication line is carried out - cable, couplings, crosses, cable technological reserves, ground electrodes, instrumentation, etc.; the compliance of the cable communication line with the current regulatory legal documents is checked, the correspondence between the actual location of the cable communication line and the data of design, executive, operational documentation, placement of the cable communication line (cable, couplings, crosses, cable technological reserves) in the ground, collectors, cable wells, buildings and structures, etc.

For payment orders No. 932 dated 04.10.2012 in the amount of RUB

4,000,000,

No. 944 dated 05.10.2012 for the amount of 1,463,462.48 rubles, No. 782 dated 26.11.2012 for the amount

1,000,000 rubles, No. 900 dated 07.12.2012 for the amount of 200,000 rubles, No. 936 dated

12.12.2012 for the amount of 1,000,000 rubles., No. 91 dated 28.12.2012 for the amount of 3,263,462.48 rubles. CJSC firm "SMUR" transferred to the settlement account of LLC "Company

"ALS and TEK" payment under contract No. 3 / 12-12 in the total amount of 10,926,924.96 rubles, which corresponds to the first and second payments provided for in clause 3.7 of contract No. 3 / 12-12.

According to the Act of Acceptance and Transfer of Property for Temporary Use dated October 10, 2012, the seller transferred and the buyer accepted for temporary use the property consisting of optical fibers and a share in the common ownership right in the Saratov-Ozinki fiber-optic communication line: 4 OVs in the module No. 1 unpainted: No. 5 gray, No. 6 white, No. 7 red, No. 8 black, total length of the section (optical) 351.878 km, as well as 4 OV of Borisoglebsk-Rogachevka FOCL.

From the act signed by the parties, it follows that the buyer has the right to use 4 (four) optical fibers in the Borisoglebsk-Rogachevka FOCL and 4 (four) optical fibers in the Saratov-Ozinki FOCL. At the time of signing this act of acceptance and transfer, the property is in working condition. The characteristics of the property comply with the conditions of the current legislation of the Russian Federation, the terms of this agreement, technical requirements for property and are reflected in the executive documentation. The buyer has no claims to the property and undertakes to return the said property from temporary use on the terms stipulated by the contract.

According to the Act of Acceptance and Transfer of Property into Ownership under Stage I of November 21, 2012, the seller transferred and the buyer took ownership of the property, consisting of optical fibers and a share in the right of common ownership in the Saratov-Ozinki fiber-optic communication line of the Saratov region on the site Ozinki-Ershov, indicated in the table, including: OK type - DKP-7-6-6 / 64; OV number - 4; the number and color of the optical module - no. 1 unpainted; number and color of optical fibers - 5 gray, 6 white, 7 red, 8 black, as well as 4 OV FOCL Borisoglebsk-Rogachevka.

It follows from the Act that after signing it, the buyer has the right to own, dispose and use 4 optical fibers in the Borisoglebsk-Rogachevka fiber-optic communication line in the section from the M2A clutch of the ORTPTS settlement Tellermanovskiy, Voronezh region to the M1 ATC joint of OJSC Rostelecom, Borisoglebsk, st. Marks, 76, and 4 optical fibers in the FOCL Saratov-Ozinki in the Ozinki-Ershov section.

The Act states that at the time of signing the Act, the property is in working order. The characteristics of the property comply with the conditions of the current legislation of the Russian Federation, the terms of this agreement, technical requirements for property and are reflected in the executive documentation. The buyer has no claims to the property. The cost of the property and the share



transferred from the seller to the buyer in stage I is 7,443,022.15 rubles, plus 18% VAT - 1,339,743.99 rubles.

(total 8 782 766.14 rubles).

According to acts (unified form No. OS-1) No. 1, No. 3 and No. 8 dated November 21, 2012, property received from LLC Company ALS and TEK under contract No. 3 / 12-12 with a total value excluding VAT 7,443,022.15 rub. accepted by CJSC firm "SMUR" for accounting as an object of fixed assets.

November 23, 2012 between CJSC firm "SMUR" (lessor) and CJSC

"KVANT-TELECOM" (lessee) signed an agreement No. 23-A4732 / 12 for the lease of a share in the right of common shared ownership of a fiber-optic communication line, under which the lessor undertakes to transfer to the lessee within 10 days from the date of signing the lease agreement specified in Appendix No. 1 property (leased object): four OV of G.652 standard and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling of the ORTPTS to Settlement Tellermanovskiy, Gribovsky District, Voronezh Region, up to the M1 coupling near the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km; four OV of G.652 standard and 4/64 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km.

According to the Acceptance and Transfer Certificate of the leased object dated November 26, 2012, the lessor transferred the specified property to the lessee for rent, and the lessee

accepted the rental object. The lessee does not have any claims to the lessor regarding the transferred lease object.

By notification ref. No. 226 dated January 27, 2014, CJSC firm "SMUR" announced the termination of contract No. 3 / 12-12 for the purchase and sale of optical fibers and a share in the right of common share ownership in a fiber-optic communication line in the Voronezh and Saratov regions dated September 10 .2012. The notice states that when the buyer makes temporary use of the property, in particular during the emergency recovery work, it was established that: 1) the identifying features of the property actually transferred for temporary use do not correspond to the identifying features of the property, which are indicated in the Statement of Transferred Property and in the act of acceptance and transfer of property for temporary use dated 10.10.2012, signed by the parties to the agreement. The numbers of actually transferred and currently used ports on the optical crossbar do not correspond to the numbers of optical fibers specified in the Act of acceptance and transfer of property for temporary use of 10.10.2012; 2) the couplings on the fiber-optic cable are made poorly: in the couplings, the module numbers are mixed up and do not join one another; the couplings are made in violation of the technical requirements established by the legislation of the Russian Federation, as a result of which water is present in them. It is also indicated that the seller does not transfer the documentation provided for by the contract. Pointing out violations by the seller of

the terms of the contract, the company

"SMUR" notifies LLC "Company" ALS and TEK "on its unilateral refusal to fulfill the sale and purchase agreement No. 3 / 12-12 dated 09/10/2012 on the basis of clause 4.2 of the contract, and also asks to return the transferred funds within 30 days in the amount of 10,926,924.96 rubles paid for the non-transferred property.

Failure to voluntarily fulfill these requirements was the basis for the plaintiff's appeal to the arbitration court with this claim.

When deciding to satisfy the claim, the court of first instance proceeded from the proof of the fact that the defendant did not transfer the property provided for by the contract to the plaintiff either for temporary use or ownership under stage I, and also did not provide the plaintiff with technical documentation, thereby committing a significant violation of the controversial contract. The court of first instance also found that the parties formally signed the Act of Acceptance and Transfer of Property for Temporary Use dated 10.10.2012 and the Act of Acceptance and Transfer of Property into Ownership by Stage I of 21.11.2012.

At the same time, after examining the evidence presented in the case materials in their interrelation and totality, the appeal board comes to the conclusion that the plaintiff's claims are not subject to satisfaction, since the legal grounds for terminating the controversial contract from the case materials are not seen.

Based on the essence of the concluded agreement No. 3 / 12-12, the legal relations of the parties are governed by both the General Provisions on the Agreement and Chapter 30 of the Civil Code of the Russian Federation (hereinafter - the Civil Code of the Russian Federation).

In accordance with paragraph 3 of Article 455 of the Civil Code of the Russian Federation, the condition of the purchase and sale (supply) agreement on the goods is considered agreed if the agreement allows determining the name and quantity of the goods.

As follows from the contract №3 / 12-12, the subject of sale and purchase are optical fibers in a fiber-optic communication line and the corresponding shares in the right of common share ownership of fiber-optic communication lines.

Satisfying the requirement to terminate the controversial contract, the court of first instance indicated that the defendant substantially violated the terms of the contract, causing damage to the plaintiff, in connection with which the latter largely lost what he had the right to count on when concluding the contract, in connection with which, the contract subject to termination.

One cannot agree with this conclusion of the court of first instance, since it is not based on the materials of the case and does not comply with the requirements of the law.

According to paragraph 2 of Article 450 of the Civil Code of the Russian Federation, a contract can be terminated by a court decision in case of a significant violation of the contract by the other party, while the violation of the contract is recognized as significant when it entails such damage for the other party that it is largely deprived of what it had the right to count on when the conclusion of the contract.

Consequently, the party invoking a material breach of the contract must provide the court with appropriate evidence of such a breach of the contract: non-

receipt of income, the possible occurrence of additional costs or other consequences that significantly affect the interests of the party. The very fact of such a violation by virtue of Article 450 of the Civil Code of the Russian Federation cannot serve as a basis for terminating the contract.

The court of first instance, taking into account the conclusions of the experts in conclusion No. 1/17 of July 18, 2017, based the argument on a significant violation of the contract, based on the fact that the property specified in the contract No. 3 / 12-12 was not transferred to the buyer.

Meanwhile, the discrepancies between the numbering of optical fibers and the brand of optical cable, specified in the disputable agreement and actually available, established by experts, do not constitute a significant violation of the terms of the agreement, since they did not deprive the buyer of the opportunity to use the received property for its intended purpose and did not entail any negative consequences for him ...

From the concept of a significant violation of a contract by one of the parties contained in paragraph 2 of Article 450 of the Civil Code of the Russian Federation (a violation of a contract by one of the parties is recognized as significant, which entails for the other party such damage that it is largely deprived of what it had the right to count on when concluding the contract) it follows that the party filing a claim with the court to terminate the contract on this

the basis, must provide evidence confirming precisely this nature of the violation.

In the course of the trial, the plaintiff did not provide the court with any evidence of causing significant damage, within the meaning of paragraph 2 of Article 450 of the Civil Code of the Russian Federation, as required by part 1 of Article 65 of the Arbitration Procedure Code of the Russian Federation, considering this the very fact of inconsistency between the numbering of fibers and the cable brand. The stated arguments about the impossibility of using the OV are refuted by the case materials, in particular, by renting and using for the purposes of transmitting telecommunication signals. The arguments about the increase in expenses for the maintenance of optical fiber located in an optical cable of a different brand are only tentative in nature and have not been documented.

Thus, the plaintiff did not provide evidence of a significant violation by the defendant of the terms of the contract in relation to paragraph 2 of Article 450 of the Civil Code of the Russian Federation.

In addition, clause 2.5 of the contract No. 3 / 12-12 provides for the grounds under which the buyer has the right to refuse to execute the sale and purchase agreement and demand the return of the money paid, namely, violation of the requirements for the quality (technical characteristics) of the OM. The existence of such grounds in the course of the trial was also not established.

By order of Rosstandart dated 11.10.2016 No. 1358-st, the national standard of the Russian Federation GOST R 57139-2016 "Optical cables. Terms and definitions" with the effective date from 01.02.2017. This standard establishes terms and definitions in the field of optical cables and their components. Similar provisions and interpretations were established by the relevant act during the disputed period.

According to the specified standard, an optical cable (OC) is understood as a cable product containing one or more optical fibers combined into a single structure

that ensures their performance under specified operating conditions. Fiber light guide (light guide) - a guiding channel for transmitting optical radiation, consisting of a core surrounded by reflective cladding (s). Optical fiber (OF) is a fiber optic fiber with protective coating (s). Optical module (OM) - an element of an optical cable made in the form of a polymer or metal tube with one or more optical fibers located in it.

At the same time, the specified standard does not refer to the elements and characteristics of the optical fiber specified in clauses 13 to 46, its color and serial number in the optical cable or module.

Thus, the discrepancy between the number of the optical fiber transferred to the plaintiff and the number of the module in the optical cable, the cable brand does not change the technical characteristics of the optical fiber, and therefore, it is not recognized as a significant violation of the terms of the purchase and sale agreement on the product, which prevents its use for the purposes specified in the contract.

Considering the fact that the plaintiff received 4 OF in the Borisoglebsk-Rogachevka FOCL and 4 OF in the Saratov-Ershov FOCL, including on the Ozinki-Ershov section, their partial payment and use for the purposes stipulated by the contract, the inconsistency of some of the identifying features: type of optical cable, module number and the number of the optical fiber specified in the contract, in fact, did not entail the inability of the buyer to accept the transferred property and in the future to use it for the purpose of transmitting telecommunication signals.

The panel of judges also takes into account that the procedure for the transfer and acceptance of property and technical requirements for property have been agreed by the parties in Appendices No. 7 and No. 8 to contract No. 3 / 12-12, which stipulate the actions of each party and the requirements for the transferred documentation. At the same time, when signing the acts of acceptance and transfer of property, the buyer indicated the compliance with the contract of the transferred property and the absence of claims on his part.

According to clause 3 of Article 1 of the Civil Code of the Russian Federation, when establishing, exercising and protecting civil rights and performing civil duties, participants in civil legal relations must act in good faith. By virtue of paragraph 4 of Article 1 of the Civil Code of the Russian Federation, no one has the right to take advantage of his illegal or dishonest behavior.

Evaluating the actions of the parties as good faith or unfair, one should proceed from the behavior expected of any participant in the civil turnover, taking into account the rights and legitimate interests of the other party, assisting it, including in obtaining the necessary information. According to the general rule of paragraph 5 of Article 10 of the Civil Code of the Russian Federation, the conscientiousness of participants in civil legal relations and the reasonableness of their actions are assumed until otherwise proven.

Consequently, acting reasonably and in good faith, the plaintiff, when signing the acts of acceptance and transfer of property, expressed obvious consent to the acceptance of such property, its use and payment.

Thus, the circumstances of a significant violation by the seller of the terms of contract No. 3 / 12-12, which could be the basis for its termination according to the rules of Article 450 of the Civil Code of the Russian Federation, are not confirmed by the case materials.

In such circumstances, the conclusion of the first instance court on the defendant's failure to fulfill the contract, contained in the contested judicial act

No. 3 / 12-12 and the existence of grounds for its termination by the court is not based on the law and contradicts the factual circumstances of the case.

In view of the absence of grounds for termination of the contract No. 3 / 12-12, the plaintiff's claims for the return of the money paid in the amount of 8 782 766.13 RUB. and contractual forfeit in the amount of 878,276.61 rubles. they are also not subject to satisfaction.

Other statements and arguments of the parties presented to the court of appeal do not change the legal assessment of the actual circumstances of

case and do not entail the establishment of other circumstances that are important for the correct resolution of the claimed dispute.

Taking into account the foregoing, the claim for termination of the contract and collection of funds should be refused.

In accordance with Article 42 of the Arbitration Procedure Code of the Russian Federation, persons who did not participate in the case, about whose rights and obligations the arbitration court adopted a judicial act, have the right to appeal this judicial act, as well as challenge it in the order of supervision according to the rules established by this Code. Such persons enjoy the rights and bear the obligations of the persons participating in the case.

In this case, a judicial act can be recognized as issued on the rights and obligations of a person who has not been involved in the case, only if it establishes the rights or obligations of this person under the legal relations established by the court.

Clauses 1 and 2 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 36 of May 28, 2009 "On the Application of the Arbitration Procedure Code of the Russian Federation in Considering Cases in an Arbitration Court of Appeal" explains that when Articles 257, 272 of the Arbitration Procedure Code of the Russian Federation are applied to arbitration courts of the appellate instance it should be taken into account that both the persons participating in the case and other persons in the cases stipulated by the Arbitration Procedure Code of the Russian Federation have the right to appeal against judicial acts in the procedure of appeal. By virtue of Part 3 of Article 16 and Article 42 of the Arbitration Procedure Code of the Russian Federation, other persons are persons whose rights and obligations have been adopted by a judicial act. In this regard, persons who are not involved in the case, both indicated and not indicated in the motivational and / or operative part of the judicial act, have the right to appeal against it by way of appeal proceedings if it is adopted about their rights and obligations, that is, given a judicial act directly affects their rights and obligations, including the creation of obstacles to the exercise of their subjective right or the proper performance of their obligations in relation to one of the parties to the dispute.

In the event that a complaint is filed by a person who did not participate in the case, the court must check whether the complaint contains a justification for how the contested judicial act directly affects the rights or obligations of the applicant. In the absence of appropriate justification, the appeal is returned by virtue of paragraph 1 of part 1 of Article 264 of the APC RF

From the appealed decision of the Arbitration Court of the Voronezh Region dated 09/01/2018 in the case, it does not appear that it was adopted on the rights and obligations of MMTS LLC.

In accordance with paragraph 3 of paragraph 2 of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated May 28, 2009 No. 36, if after the acceptance of the appeal it is established that the applicant does not have the right to appeal the judicial act, then in relation to paragraph 1 of part 1 of Article 150 of the APC RF the proceedings on the complaint shall be terminated.

Taking into account the foregoing, the appellate court considers that MMTS LLC does not have the right to appeal the decision of the Arbitration Court of the Voronezh Region dated 01/09/2018 in this case, since it did not prove the existence of a legitimate interest in appealing the decision. It has been established that neither in the reasoning, nor in the operative part of the

contested decision, the rights of the applicant of the appeal regarding the parties to the dispute have not been established, no obligations have been assigned to him.

Thus, the proceedings on the appeal of MMTS LLC shall be terminated on the basis of the provisions of the said legal norms.

In connection with the termination of the proceedings on the appeal, the state duty paid by the applicant is subject to refund from the federal budget.

According to parts 1, 2 of Article 71 of the Arbitration Procedure Code of the Russian Federation, the arbitration court evaluates the evidence according to its conviction, based on a comprehensive, complete, objective and direct study of the evidence available in the case. The arbitral tribunal assesses the relevance, admissibility, reliability of each piece of evidence separately, as well as the sufficiency and interconnection of evidence in their entirety.

Having assessed by its inner conviction each piece of evidence separately, as well as the sufficiency and interconnection of the evidence in its entirety (Article 71 of the Arbitration Procedure Code of the Russian Federation), the court of appeal sees no grounds for terminating contract No. 3/12-12 according to the rules of Part 2 of Article 450 of the Civil Code of the Russian Federation ... Under the aforementioned circumstances, the panel of judges comes to the conclusion that the decision of the first instance court should be canceled, and the declared claim should be dismissed.

On the basis of Article 269 of the Arbitration Procedure Code of the Russian Federation, based on the results of the consideration of the appeal, the arbitration court of the appellate instance has the right to cancel or change the decision of the first instance court in full and adopt a new judicial act on the case (paragraph 2).

According to clause 3 of part 1 of article 270 of the Arbitration Procedure Code of the Russian Federation, the discrepancy between the conclusions set out in the decision and the circumstances of the case is the basis for changing or canceling the decision of the arbitration court of first instance.

The appellate court considers that the conclusion of the first instance court on a material breach of the contract by the defendant does not correspond to the circumstances of the case and the evidence presented, which led to the adoption of an incorrect decision.

Violations of the norms of procedural law, which, according to paragraph 4 of Article 270 of the Arbitration Procedure Code of the Russian Federation, are an unconditional basis for canceling a judicial act, have not been established by the court of appeal.

In accordance with Article 110 of the Arbitration Procedure Code of the Russian Federation, court costs incurred by persons participating in the case, in whose favor the judicial act was adopted, are recovered by the arbitration court from the side. In the event that the claim is satisfied in part, the court costs are borne by the persons participating in the case in proportion to the amount of the satisfied claims.

When filing a claim for termination of the contract and collection of 10,741,873.77

rub., based on the size of the state fee 6000 rub. on demand non-property

nature and 76 709 RUB. upon the demand for the recovery of funds, the plaintiff paid the state duty in the amount of 82,709.37 rubles, including: stated about the offset of 80,981.55 rubles. and transferred 1,727.82 rubles.

Prior to the adoption of the judicial act by the plaintiff, the amount of claims for the recovery of monetary funds was reduced to 9,661,042.74 rubles, which corresponds to the state duty in the amount of 71,305 rubles.

Thus, the state duty in the case is 77,305 rubles. (6,000 rubles + 71,305 rubles).

In connection with the payment of the state fee in a larger amount, 5404 rubles should be returned to the plaintiff from the federal budget. (82 709 rubles - 77 305 rubles), having issued the appropriate certificate.

When the court of first instance rendered the contested judicial act, the plaintiff was returned from the federal budget the state duty in the amount of 3,676.33 rubles, which does not correspond to the amount of the overpaid state duty, which is the basis for changing the judicial act adopted with the incorrect application of procedural norms imposing on the arbitration court is obliged to correctly determine the value of the claim for the purpose of calculating the state duty (Article 103 of the APC RF).

Given the refusal to satisfy the claim, in accordance with Article 110 of the Arbitration Procedure Code of the Russian Federation, the court costs of the defendant shall be attributed to the plaintiff. In the course of the trial, in order to pay the costs of the forensic examination, the defendant contributed 300,000 rubles to the deposit account of the Arbitration Court of the Voronezh Region, which are subject to compensation at the expense of the plaintiff.

Funds deposited by the plaintiff to the deposit account of the Arbitration Court of the Voronezh Region in the amount of 900,000 rubles. for the payment of the forensic examination are attributed to the plaintiff and are not subject to compensation.

In connection with the forensic examination of the case, the parties deposited funds in the amount of 1,200,000 rubles into the deposit account of the Arbitration Court of the Voronezh Region.

On the basis of Part 2 of Article 107 of the Arbitration Procedure Code of the Russian Federation, experts receive remuneration for work performed by them on behalf of the arbitration court, if this work is not included in the scope of their official duties as employees of state forensic institutions. The amount of the expert's remuneration is determined by the court in agreement with the persons participating in the case, and by agreement with the expert.

By virtue of part 1 of Article 108 of the Arbitration Procedure Code of the Russian Federation, the sums of money to be paid to experts and witnesses are deposited into the deposit account of the arbitration court by the person who made the relevant petition within the time period established by the arbitration court. If the said request is filed by both parties, the required sums of money are paid by the parties to the deposit account of the arbitration court in equal parts.

According to part 1 of Article 109 of the Arbitration Procedure Code of the Russian Federation, the sums of money due to experts, specialists, witnesses and translators are paid upon the performance of their duties.



According to clause 26 of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 04.04.2014 No. 23 "On some issues of the practice of application by arbitration courts of legislation on examination", the sums of money owed to an expert, in accordance with Part 1 of Article 109 of the Arbitration Procedure Code of the Russian Federation, are paid after he has performed his duties in connection with production of expertise. The transfer of funds to an expert (expert institution, organization) is made from the deposit account of the court or at the expense of the federal budget by the financial service of the court on the basis of a judicial act, in the operative part of which the judge indicates the amount of money due to the expert. The court issues such an act at the end of the court session in which the expert's opinion was examined.

Taking into account the above provisions, the money owed to the expert for the forensic examination is subject to transfer according to the determination of the court of first instance, which should have been rendered at the end of the court session in which the experts' findings were examined, in this case - the court session on 08/10/2017. Thus, the court of first instance must issue an appropriate ruling on the transfer of 1,200,000 rubles from the deposit account. an expert institution for carrying out a forensic examination.

On the basis of part 6 of Article 110 of the Arbitration Procedure Code of the Russian Federation, unpaid or incompletely paid expenses for the examination are subject to recovery in favor of the expert or the state forensic institution from the persons participating in the case, in proportion to the amount of the satisfied claims.

To reimburse the expert's expenses in connection with participation in the court session, 367 399 rubles are subject to recovery from JSC SMUR in favor of the federal state unitary enterprise Central Research Institute of Communications, according to the application for reimbursement of expenses dated November 30, 2017 ref. No. 53.2 / 2246.

Based on the results of the consideration of the appeal, the court costs incurred by the defendant to pay the state fee in the amount of 3000 RUB. (payment order No. 431 dated 02.19.2018) are to be attributed to the plaintiff.

Guided by Articles 9, 41, 42, 65, 110, 123, 150, 156, 266 - 271 of the Arbitration Procedure Code of the Russian Federation, the Nineteenth Arbitration Court of Appeal

**sentenced:**

proceedings on the appeal of the Limited Liability Company "Intercity International Telephone Station" against the decision of the Arbitration Court of the Voronezh Region dated 09.01.2018 in the case

No. A14-8464 / 2015 to terminate under clause 1 of part 1 of article 150 of the APC RF.

Issue to the limited liability company "Intercity International Telephone Station" (PSRN 1056405053352, TIN 6452913127) a certificate for the refund from the federal budget of 3000 rubles. the state fee paid by payment order No. 38830 dated 04.16.2018.

## Limited Liability Company Appeal

"The ALS and TEK company will satisfy.

The decision of the Arbitration Court of the Voronezh Region dated 09.01.2018 in case No. A14-8464 / 2015 should be canceled.

In satisfaction of the claim of the joint-stock company firm "SMUR" (OGRN 1023601610878, TIN 3662020332) against the limited liability company "Company" ALS and TEK "(OGRN 1026402661108, TIN 6452045336) on termination of the sale and purchase agreement, on the recovery of 8,782,766.13 rubles ... unjust enrichment and 878,276.61 rubles. forfeit to refuse.

To collect from the joint-stock company firm "SMUR" (OGRN 1023601610878, TIN 3662020332) in favor of the limited liability company "Company" ALS and TEK "(OGRN 1026402661108, TIN 6452045336) RUB 300,000. to reimburse the costs of paying for the forensic examination.

To collect from the joint-stock company firm "SMUR" (OGRN 1023601610878, INN 3662020332) in favor of the federal state unitary enterprise Central Research Institute of Communications (OGRN 1037739167608, INN 7720005291) 367 399 RUB. expenses,

related to summoning an expert to a court session, as well as giving written explanations.

Issue to the joint-stock company the firm "SMUR" (OGRN 1023601610878, TIN 3662020332) a certificate for the return from the federal budget of 5404 rubles. the state fee paid in a larger amount by payment order No. 202 dated 23.01.2015.

To collect from the joint-stock company firm "SMUR" (OGRN 1023601610878, TIN 3662020332) in favor of the limited liability company "Company" ALS and TEK "(OGRN 1026402661108, TIN 6452045336) 3000 rubles. in reimbursement of the costs of paying the state fee for filing an appeal. The resolution comes into legal force from the date of its adoption and can be appealed to the Arbitration Court of the Central District within two months through the arbitration court of first instance in accordance with Part 1 of Article 275 of the Arbitration Procedure Code of the Russian Federation.

Presiding judge C.AND. Writing

Judges E.V. Korovushkina

L.M. Mokrousova