NINETEENTH ARBITRAL OF APPEAL COURT

RESOLUTION

February 05, 2020 Case No. A14-1036 / 2017 Voronezh

The operative part of the resolution was announced on January 31, 2020 The resolution was issued in full on February 5, 2020

Nineteenth Arbitration Court of Appeal composed of: the presiding judge Porotikov A.I.,

judges Korableva G.N.,

Shcherbatykh E.Yu., while keeping the minutes of the court session by the secretary A.A. Nesterova,

with the participation:
from the limited liability company "Company" ALS and TEK ": Puzyreva E.G., a representative by power of attorney w / o from 24.09.2019;
from the joint-stock company firm "SMUR": attorney Tatarovich I.A., power of attorney No. 11 dated 01.01.2020; Litvinova N.N., a representative by power of attorney No. 36 AB 2524556 dated 05/17/2018;
from the limited liability company "Directorate of communications enterprises under construction": the representative did not appear, the evidence of proper notification is available in the case file,

Having considered in open court appeals of the Limited Liability Company Directorate of Communication Enterprises under Construction, which applied in accordance with Article 42 of the Arbitration Procedure Code of the Russian Federation, and the ALS and TEK Company Limited Liability Company against the decision of the Arbitration Court of the Voronezh Region dated 15.10. 2019 in case No.A14-1036 / 2017 (judge Bobreshova A.Yu.) on the claim of the joint-stock company firm "SMUR" (OGRN 11023601610878, TIN 3662020332), Voronezh, against a limited liability company

"Company" ALS and TEK "(OGRN 1026402661108, TIN 6452045336), Saratov,

o recognition of the basis for termination of the contract No. 3 / 12-12 of 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, signed on 10.09.2012. in terms of 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 on the Saratov-Ershov section in the Saratov-Ozinki fiber-optic communication line, a significant violation of the terms contract on the part of the seller, namely failure to fulfill the obligation to transfer goods - optical fibers with the identifying characteristics specified in the contract, due to the lack of property subject to transfer under the contract; on the collection from LLC "Company" ALS and TEK "in favor of JSC firm
"SMUR" cash (prepayment for goods under the contract
No. 3 / 12-12 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, concluded on September 10, 2012) in the amount of 2
144 158, 83 (two million one hundred forty-four thousand one hundred fifty-eight rubles eighty-three kopecks) rub. on the recovery from LLC “Company“ ALS and TEK ”in favor of JSC firm“ SMUR ”penalties under 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 Voronezh and Saratov regions, concluded on 10.09.2012. in the amount of 190 830 (one hundred ninety thousand eight hundred thirty) rubles. 24 kopecks for the period from 03/21/2014 to 06/17/2014, on the collection from LLC "Company" ALS and TEK "in favor of JSC firm" SMUR "interest for the use of other people's funds in the amount of 1 104 414 (one million one hundred four thousand four hundred fourteen) rub. 03 kopecks for the period from 01/29/2013 to 02/04/2019 and further until the day of the return of the prepaid amount by the defendant,

found:

Joint-stock company firm "SMUR" (hereinafter - JSC firm "SMUR", the plaintiff) applied to the Arbitration Court of the Voronezh Region with a statement of claim against the limited liability company "Company" ALS and TEK "(hereinafter - LLC" Company "ALS and TEK", defendant) on the recovery of the cost of prepayment for the goods under the contract for the sale of optical fibers No. 3 / 12-12 dated 09/10/2012 and a share in the right of common share ownership in a fiber-optic communication line in the Voronezh and Saratov regions in the amount of 2,144,158 rub. 83 kopecks, in connection with failure to fulfill the obligation to transfer goods - optical fibers with the identifying characteristics specified in the contract: optical fibers "No. 5 gray", "No. 6 white", "No. 7 red", "No. 8 black" in the optical module "No. 1 unpainted" in the optical cable DKP-7-6-6 / 64 from

points (optical crossover in a container on the territory of the RTRS "Saratov

Regional Broadcasting Center" at the address Saratov Region, Ershov, Meliorativnaya St., 32 A) to the point (distribution main coupling MRM28 near the settlement of Pushkino, Sovetsky District, Saratov Region.); from the point (main distribution coupling MRM28 near the village of Pushkino, Sovetskiy district, Saratov region) to the point (optical crossover in a container on the territory of OJSC "Urbakhsky Kombinat Khleboproduktov" , Zavodskaya st., 1A); from the point (distribution main coupling 4 MRM28 near the settlement of Pushkino, Sovetskiy district, Saratov region 4) to the point (optical crossover "VOSTOK" LLC "Company" ALS and TEK "Saratov, B. Kazachya st., 6); from the point (optical cross "VOSTOK" LLC

"Company" ALS and TEK "Saratov, st. B. Kazachya, 6) to the point (optical crossover of LLC “Company“ ALS and TEK ”on the territory of OJSC“ Integral ”at the address Saratov, Chernyshevsky st., 153); due to the lack of property subject to transfer under the contract; on the recovery of penalties in the amount of 190 830 RUB. 24 kopecks for the period from 21.03.2014 to 17.06.2014 and interest for the use of other people's funds in the amount of 1,159,501 rubles. 29 kopecks for the period from 01/29/2013 to 06/05/2019 with the continuation of their accrual until the day the prepayment cost is refunded (taking into account the clarifications adopted by the court).

By the decision of the Arbitration Court of the Voronezh Region dated 15.10.2019, the claims were satisfied in this case.

Disagreeing with the decision, citing its illegality and groundlessness, the defendant appealed to the Nineteenth Arbitration Court of Appeal with an appeal, in which he asked the court's decision to cancel, to adopt a new judicial act.

An appeal against the said court decision, in accordance with Article 42 of the Arbitration Procedure Code of the Russian Federation, was also filed by the limited liability company Directorate of Communications Enterprises under Construction (hereinafter referred to as LLC DSPS), referring to the fact that the appealed court decision creates obstacles to the exercise by the company of its rights as an owner to dispose of property within the framework of the sale and purchase agreement No. ALS-DSPS / OV of 12.09.2018 concluded with the defendant, asked to cancel it, to adopt a new judicial act on the case to dismiss the claim.

In addition, in the process of considering this case by the court of appeal, a complaint was filed with a complaint in accordance with Article 42 of the Arbitration Procedure Code of the Russian Federation, a limited liability company Poseidon, which is the owner of optical fibers in a fiber-optic communication line at

Saratov-Ershov and Saratov-Ozinki.

By the definitions of the Nineteenth Arbitration Court of Appeal dated November 19, 2019 and December 2, 2019, the appeals of LLC “Company“ ALS and

TEK "and LLC" DSPS "are accepted for production. The trial was adjourned.

In accordance with the definition of the Nineteenth Arbitration Court of Appeal dated January 23, 2020, the appeal of LLC Poseidon was returned on the basis of Part 5 of Article 264 of the Arbitration Procedure Code of the Russian Federation, due to the failure of the company to eliminate violations of paragraphs 2 and 3 of Part 4 of Article 260 of the Arbitration Procedure Code of the Russian Federation. Federation,

which served as the basis for leaving the complaint without movement, within the time period established by the court.

Representatives of LLC "Company" ALS and TEK "and LLC" DSPS "in the court session on January 24, 2020 supported the arguments of their appeals and complaints, believing the appealed decision to be illegal and unreasonable, asked to cancel it, to adopt a new judicial act on the case refusing to satisfy the stated requirements in full.

The plaintiff's representatives objected to the arguments of the appeal, considered the contested decision legal and well-grounded on the grounds set out in the response to the complaint submitted to the court, asked to leave it unchanged, and the complaint was not satisfied.

A break was announced in the court session.

At the continued hearing of the court of appeal on January 31, 2020, OOO DSPS did not ensure the appearance of its representative, having sent an application to the court to consider appeals in his absence.

Representatives of LLC "Company" ALS and TEK "and JSC firm" SMUR "held their positions on the case.

The panel of judges, having examined the presented materials of the case, having studied the arguments of the appeals, having heard the explanations of the representatives who appeared at the court session, comes to the conclusion that the appealed decision of the court should be canceled, and the claim should be refused. The court proceeds from the following.

As follows from the materials of the case, under the agreement for the sale of optical fibers and a share in the right of common shared ownership in a fiber-optic communication line in the Voronezh and Saratov regions No. 3 / 12-12 dated 04.09.2012, the defendant undertook to transfer the property to the plaintiff, including four optical fibers in the Saratov-Ozinki fiber-optic communication line, with a total length of 345.078 km, the individualizing characteristics of which are indicated in the statement attached to the contract.

According to clause 3.5. of the agreement, the total value of the property and share transferred from the seller to the buyer under this agreement is 18,520,211 rubles. 79 kopecks, which, in accordance with the contract, is paid by the buyer in three installments.

By virtue of clause 3.7 of the agreement, four optical fibers in the Saratov-Ozinki fiber-optic communication line were transmitted during a temporary

use by the buyer within ten calendar days after the first payment.

The transfer of the specified goods to the ownership of the buyer is made after the third payment is made.

After payment orders No. 932 dated 04.10.2012 for the amount of 4,000,000 rubles, No. 944 dated 05.10.2012 for the amount of 1,463,462.48 rubles. the buyer made the first payment under the contract, the parties signed an act of acceptance and transfer of property for temporary use dated 10.10.2012, which includes four fibers in the Saratov-Ozinki fiber-optic communication line.

The property received under the act on November 26, 2012 was leased by the plaintiff to the closed joint-stock company "QUANT-TELECOM" under an agreement

No. 23-A4732 / 12 of the lease of a share in the right of common shared ownership of fiber-optic communication lines and, as established by the resolution of the Twelfth Arbitration Court of Appeal dated 13.12.2017 in case No. A57-233 / 2017, was used by the lessee until 06.02.2013 inclusive.

Referring to the fact that in the course of emergency restoration work during the use of the transferred property, it was found that it did not correspond to the identifying features of the property specified in the contract and the acceptance certificate dated 10.10.2012, the buyer sent a notice of termination of the contract to the seller on 27.01.2014 and return of funds in the amount of 10 926 924 rubles. 96 kopecks, paid under the contract.

By the decision of the Nineteenth Arbitration Court of Appeal dated 09/14/2018, upheld by the decision of the Arbitration Court of the Central District of 01/31/2019 in case No. A14-8464 / 2015, it was established that there were no grounds for termination of the contract through the fault of the seller.

In turn, the seller, by a letter dated 05/27/2014, announced a unilateral cancellation of contract No. 3 / 12-12 dated 09/04/2012 regarding the transmission of four optical fibers in the Saratov-Ozinki fiber-optic communication line and demanded its return due to the buyer's failure to fulfill the obligation on payment for the goods within the period specified in the contract.

The refusal to satisfy the claim was the reason for the seller's appeal to the arbitration court with the requirement to the buyer to return the disputed property.

Opposing the claim, the firm "SMUR" referred to the fact that the property, which by its characteristics: brand, color, numbering of fibers and module, would correspond to the terms of the contract, the seller did not have, and therefore was not transferred to the buyer, and, therefore, did not can be returned by LLC

"Company ALS and TEK".

By the decision of the Twelfth Arbitration Court of Appeal dated 13.12.2017 in case No. A57-233 / 2017, upheld by the decision of the Arbitration Court of the Volga District dated 17.05.2018, the claims were satisfied.

At the same time, the court considered it proven the fact of acceptance and use of the disputed property by the defendant, rejecting the defendant's argument about the absence of the disputed property and the arisen legal relationship under the contract of sale.

The judicial act in case No. A57-233 / 2017 was actually executed, the disputed property was transferred to DSPS LLC.

The reason for going to court in the present case was the circumstances indicating the failure to fulfill the contractual obligation to transfer the goods to the buyer, due to its absence from the seller.

The plaintiff substantiated his right with the provisions of paragraph 3 of Article 487 of the Arbitration Procedure Code of the Russian Federation, allowing the buyer to claim the return of the prepayment amount for the goods not transferred by the seller.

The regional arbitration court satisfied the claim, considering it proven that the seller had violated the contract, confirmed by the results of the forensic examination carried out in the case.

However, the court did not take into account the following.

By virtue of paragraph 1 of Article 454 of the Civil Code of the Russian Federation, under a sale and purchase agreement, one party (the seller) undertakes to transfer the thing (goods) to the ownership of the other party (the buyer), and the buyer undertakes to accept this product and pay a certain amount of money (price) for it ...

According to clause 1 of Article 456 of the Civil Code of the Russian Federation, the seller is obliged to transfer to the buyer the goods provided for in the sales contract.

Unless otherwise provided by the contract of sale, the seller is obliged, simultaneously with the transfer of the thing, to transfer to the buyer its accessories, as well as related documents (technical passport, quality certificate, operating instructions, etc.) provided for by law, other legal acts, or agreement (paragraph 2 of Article 456 of the Civil Code of the Russian Federation).

In the event that the seller, who has received the prepayment amount, does not fulfill the obligation to transfer the goods within the prescribed period (article 457 of the Civil Code of the Russian Federation), the buyer has the right to demand the transfer of the paid goods or the return of the prepayment amount for the goods not transferred by the seller (paragraph 3 of article 487 of the Civil Code of the Russian Federation).

From the moment of exercising the right to claim for the return of the prepayment amount, the party that has made this claim is considered to have lost interest in the further execution of the terms of the contract, and the contract is considered to have ceased to be effective, which was drawn to the attention of the courts in the ruling of the Supreme Court of the Russian Federation dated May 31, 2018 in case No. 309-ES17-21840.

Thus, the buyer requiring the return of the prepayment amount in accordance with Article 487 of the Civil Code of the Russian Federation is obliged to prove the fact of delay in the transfer of the goods by the seller, as well as the fact that the sale and purchase agreement by the time of the implementation of the request to return the purchase price did not terminate on other grounds ...

On the basis of clause 3 of Article 405 of the Civil Code of the Russian Federation, the debtor is not considered overdue until the obligation can be performed due to the delay of the creditor.

Within the meaning of paragraph 1 of Article 314 of the Civil Code of the Russian Federation, the calculation of the term for the fulfillment of an obligation is allowed, inter alia, from the moment the other party fulfills its obligations or the occurrence of other circumstances provided for by law or contract. Likewise, by virtue of Article 327.1 of the Civil Code of the Russian Federation, the fulfillment of duties, as well as the exercise, change and termination of certain rights under a contractual obligation, may be conditioned by the performance or non-performance of one of the parties of the obligation of certain actions or the occurrence of other circumstances provided for by the contract, including those completely dependent on the will of one of the parties.

By the terms of the agreement (clauses 3.7.5 -3.7.6), the parties stipulated the obligation to transfer the disputed optical fibers to the third payment in the amount of 9 260 105 rubles. 90 kopecks, which is paid by the buyer within one calendar year from the date of signing the contract, after making the first and second payments.

The materials of the case do not contain information on the timely fulfillment of the specified monetary obligation, with which the parties have linked the term for

transferring the disputed property to the ownership of the buyer.

Clause 1 of Article 488 of the Civil Code of the Russian Federation stipulates that in the case when the contract of sale provides for payment for the goods after a certain time after its transfer to the buyer (sale of goods on credit), the buyer must make payment within the period provided for by the contract, and if such the term is not provided for by the contract, within the term determined in accordance with Article 314 of this Code.

From the content of Article 491 of the Civil Code of the Russian Federation, it follows that the seller, who remains the owner of the goods, has the right to demand its return if this product is not paid for by the buyer within the prescribed period, or other circumstances provided by the contract do not occur.

In case of violation of the terms of payment for the property through the fault of the buyer for more than ninety calendar days, the parties provided for the seller's right to unilaterally and out of court to refuse to execute the contract, returning the advance paid earlier within thirty calendar days

days from the date of sending the notification of cancellation to the buyer (clause 4.4 of the contract).

The improper fulfillment of the obligation to pay the third payment was the basis for a unilateral refusal to fulfill the contract, which followed in a letter dated May 27, 2014. Thus, the seller has exercised the right provided by law and contract.

It follows from the foregoing that by the time of filing a claim for the return of the advance payment, the controversial agreement terminated due to the fault of the buyer, and therefore cannot be terminated in accordance with paragraph 3 of Article 487 of the Civil Code of the Russian Federation.

At the same time, there is no reason to believe that before the termination of the contract the seller was late in transferring the disputed property to the court.

The decision of the Twelfth Arbitration Court of Appeal dated December 13, 2017 in case No. A57-233 / 2017, which entered into legal force, established that on 10.10.2012 the General Director of CJSC SMUR signed an act of acceptance of the transfer of property for use in a fiber-optic communication line, including including, and on the second stage of the contract on the Saratov-Ershov section.

From this act of acceptance and transfer it follows that at the time of its signing the property was in working condition, the buyer has no claims.

After the transfer of the disputed property, the contract continued to be executed by the defendant in terms of payment until 12/28/2012, and on 11/21/2012 the defendant signed an act of acceptance of the transfer of property into ownership at the first stage.

The operability of the transferred goods in the future, at the time of disconnection of optical fibers by the seller, is also evidenced by the unilateral act of return of property from temporary use dated June 17, 2014, signed unilaterally by the General Director of CJSC SMUR.

At the same time, the signing of the act of acceptance and transfer of the disputed property before the date of receipt of permits for the construction of a fiber-optic communication line, the court concluded, does not indicate the absence of the disputed property. As of the date of the actual transfer of the disputed property, the

fiber-optic communication line itself and, as a result, the disputed optical fibers existed.

Thus, satisfying the claims in case No. A57-233/2017, the arbitration court established the fact that the seller had properly fulfilled his obligations to transfer the disputed property to the buyer for temporary use.

In this case, the occurrence of the circumstances with which the contract connects the emergence of the seller's obligation to transfer the goods to the buyer's ownership has not been established.

According to part 2 of Article 69 of the Arbitration Procedure Code of the Russian Federation, the circumstances established by a judicial act of an arbitration court on a previously considered case that has entered into legal force are not proven again when the arbitration court considers another case in which the same persons are involved.

It does not follow from the provisions of Article 69 of the Arbitration Procedure Code of the Russian Federation that in order to recognize a judicial act as prejudicial in relation to another dispute, the composition of the participants in these disputes must be identical. To comply with the subjective limits of the validity of this norm, it is sufficient that the persons participating in the case were also participants in the dispute considered earlier, while the composition of other persons participating in the case may not coincide.

Considering that the parties to the present dispute took part in case No. A57-233 / 2017, the circumstances established by a court act in this case that entered into legal force are of prejudicial significance for them when considering this dispute.

The referral of facts to those established by a judicial act that has entered into legal force means that the persons participating in the case do not have the right to dispute and refute such facts in order to replace the previously made conclusions with the opposite. The property of the irrefutability of a judicial act on a previously considered case is a manifestation of the legal force of court decisions, their generally binding and enforceable nature (Part 1 of Article 16 of the Arbitration Procedure Code of the Russian Federation).

This situation exists until the judicial act in which these facts are established is canceled in the manner prescribed by law.

As indicated by the Constitutional Court of the Russian Federation, the exceptional in its essence the possibility of overcoming the finality of judicial acts that have entered into legal force presupposes the establishment of such special procedures and conditions for their revision, which would meet, first of all, the requirements of legal certainty provided by the recognition of the legal force of judicial decisions, their irrefutability, which in relation to decisions made in ordinary court proceedings, it may be shaken if any new or newly discovered circumstance or found fundamental violations undeniably testify to a miscarriage of justice, without the elimination of which a competent court cannot compensate for the damage caused (decisions of May 11, 2005 No. 5-P, dated February 5, 2007 No. 2-P and dated March 17, 2009 No. 5-P, definition dated January 15, 2008 No. 193-O-P)

The ruling of the Twelfth Arbitration Court of Appeal of 13.12.2017 in case No. A57-233 / 2017 was not revised in the manner prescribed by law. Consequently, the conclusions contained in the said act on the proper performance by the seller of the obligation to transfer the goods for use to the buyer, relate to significant circumstances in the case, are binding on the arbitration court considering this

dispute, nature and cannot be refuted by means of new evidence presented by the defendant or obtained during the forensic examination of the case.

Considering the claim of the plaintiff, the court analyzed the evidence already assessed by the courts when considering another case, and revised the previously established circumstances, thereby violating the requirements of Articles 16 and 69 of the Arbitration Procedure Code of the Russian Federation.

The conclusion of the arbitration court on the lack of connection between the requirements stated in the framework of this trial by a previously adopted judicial act with reference to paragraph three of clause 2 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.07.2009 No. 57 "On some procedural issues of the practice of considering cases related to non-performance or improper performance of contractual obligations "and clause 4 of the joint Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation dated April 29, 2010 No. 10/22" On some issues arising in judicial practice when resolving disputes related to the protection of property rights and other property rights ", is based on an incorrect interpretation of the rules of procedural law.

In the fourth paragraph of clause 9 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of December 19, 2003 No. 23 "On a court decision" it is indicated that persons who did not participate in a case in which a court of general jurisdiction or an arbitration court issued an appropriate court order, are entitled when considering another civil case with their participation to challenge the circumstances established by these judicial acts. In such cases, the court makes a decision on the basis of a full examination of all the evidence presented in the second trial.

Within the meaning of the above explanations, the circumstances established in the previously considered case are not binding only for persons who did not participate in such a case, to whom the parties to the dispute do not belong.

Since the arbitral tribunal has once already made conclusions regarding the proper performance of the seller's obligations under the controversial agreement, the court cannot come to other conclusions when considering this case with the participation of the same persons.

Taking into account the above, the court of appeal considers that the plaintiff has not proved the occurrence of the circumstances with which paragraph 3 of Article 487 of the Civil Code of the Russian Federation connects the buyer's right to demand from the seller who has violated the contract the return of the prepayment amount, and therefore, considers it necessary to refuse to satisfy the requirements declared on the stated grounds

Due to the fact that other grounds for the return of funds, in particular, those established by clause 4.4 of the contract, article 491, articles 1102, 1107 of the Civil Code of the Russian Federation on the consequences

termination of the contract through the fault of the buyer and the return of the advance paid, the plaintiff did not declare, satisfaction of the claim with reference to factual circumstances different from those indicated by the plaintiff when applying to the arbitration court would entail the court going beyond the scope of the claims, despite the dispositive and adversarial nature of the legal process (Article 4 , 9, 41, 49 of the Arbitration Procedure Code of the Russian Federation).

The defendant's argument about the identity of the claims filed in this dispute and within the framework of case No. A14-2754 / 2014 is based on an incorrect interpretation of the procedural law and contradicts the circumstances of the case, from which it follows that the basis of the claims stated in the framework of another case was a different composition circumstances, including, in particular, the buyer's refusal from the contract, formalized by the notice of termination of the contract and the return of funds from 01/27/2014.

Having examined the arguments of the appeal of LLC "DSPS", the judicial board comes to the conclusion that the proceedings on it must be terminated in connection with the following.

In accordance with Article 42 of the Arbitration Procedural 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 against 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 dated May 28, 2009 "On the Application of the Arbitration Procedure Code of the Russian Federation when Considering Cases in an Arbitration Court of Appeal" explains that when applying Articles 257, 272 of the the courts of appeal should take into account that both the persons participating in the case and other persons in the cases provided for by the Arbitration Procedure Code of the Russian Federation have the right to appeal against judicial acts in the procedure of appeal proceedings.

By virtue of part 3 of Article 16 and Article 42 of the Arbitration Procedure Code of the Russian Federation, other persons include 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 accepted about their rights and

obligations, that is, this 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 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 substantiation of how the contested judicial act directly affects the rights or obligations of the applicant. In the absence of appropriate justification, the appeal shall be returned by virtue of clause 1

of part 1 of Article 264 of the Arbitration Procedure Code of the Russian Federation.

At the same time, LLC "DSPS" is not a person participating in the case, it does not follow from the content of the contested decision that the issued judicial act affects his rights and legitimate interests, the applicant has not proven otherwise.

The arguments of the public's appeal that a dispute over the performance of an obligation, in which it does not participate, deprives it of its rights in relation to the disputed property, are based on an incorrect interpretation of the law.

In accordance with paragraph 2 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated November 22, 2016 No. 54 "On some issues of the application of general provisions of the Civil Code of the Russian Federation on obligations and their fulfillment" according to the general rule provided for in paragraph 3 of Article 308 of the Civil Code of the Russian Federation, the obligation is not creates rights and obligations for persons who do not participate in it as parties (for third parties). Accordingly, the parties to the obligation cannot raise objections to third parties based on an obligation between themselves, just as third parties cannot raise objections arising from an obligation in which they do not participate.

According to 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 Arbitration Procedure Code of the Russian Federation Federation proceedings on the complaint shall be terminated.

In view of the above, the court of appeal considers that LLC "DSPS" does not have the right to appeal the decision of the arbitration court in this case, due to the lack of evidence 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 LLC "DSPS" shall be terminated on the basis of the provisions of the specified rules of law.

State fee for the consideration of an appeal in the amount of 3,000 rubles, paid by a limited liability company

"Company" ALS and TEK "(OGRN 1026402661108, TIN 6452045336)

payment order No. 704779 dated 01.11.2019 for consideration of the appeal of the limited liability company "Directorate of Communications Enterprises under Construction" shall be returned to the specified person from the federal budget on the basis of Article 333.40 of the Tax Code of the Russian Federation.

By virtue of the foregoing, the decision of the court of first instance is subject to cancellation on the basis of clause 4 of part 1 of Article 270 of the Arbitration Procedure Code of the Russian Federation.

According to the provisions of Article 110 of the Arbitration Procedure Code of the Russian Federation, the court costs for the state fee for the consideration of the appeal shall be borne by its applicant, and shall not be refunded or reimbursed.

Taking into account the results of the consideration of this case and according to the rules of Article 110 of the Arbitration Procedure Code of the Russian Federation from the joint-stock company firm "SMUR" (OGRN 1023601610878, INN 3662020332) in favor of the limited liability company "Company

"ALS and TEK" (PSRN 1026402661108, TIN 6452045336) are subject to

collection

RUB 3,000 the cost of paying the state fee for the consideration of the appeal. Guided by Articles 42, 150, 269 - 271 of the Arbitration Procedure Code of the Russian Federation,

sentenced:

The proceedings on the appeal of the Limited Liability Company Directorate of Communications Enterprises under Construction against the decision of the Arbitration Court of the Voronezh Region dated 15.10.2019 in case No. A14-1036/2017 shall be terminated.

Limited Liability Company Appeal

"The company" ALS and TEK "to satisfy the decision of the Arbitration Court of the Voronezh Region dated 15.10.2019 in case No. A14-1036 / 2017.

The decision of the Arbitration Court of the Voronezh Region of 15.10.2019 in the case

No. A14-1036 / 2017 to cancel.

In satisfying the claims of the joint-stock company, the firm

"SMUR" to refuse.

Collect from the joint-stock company the firm "SMUR" (OGRN 1023601610878, TIN 3662020332) in favor of the limited liability company "Company" ALS and TEK "(OGRN 1026402661108, TIN

6452045336) 3,000 rubles. the cost of paying the state fee for the consideration of the appeal.

Return to the limited liability company "Company

"ALS and TEK" (PSRN 1026402661108, TIN 6452045336) from the federal

budget 3,000 rubles. the state duty paid under payment order No. 704779 dated 01.11.2019 for consideration of the appeal of the limited liability company "Directorate of Communications Enterprises under Construction".

The decision comes into legal force from the date of its adoption and can be appealed on cassation 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 A.AND. Porotikov

Judge G.N. Korableva

E.Yu. Shcherbatykh