ARBITRATION COURT OF THE CENTRAL DISTRICT

Statement

the cassation instance for checking the legality and validity of judicial acts of arbitration courts that have entered into legal force

29 July 2020 case №A14-1036/2017 Kaluga

The operative part of the resolution was announced on July 22, 2020 The resolution was made in full on July 29, 2020

The Arbitration Court of the Central District consisting of: the presiding judge V.I. Smirnova
judges R.G. Kalutskikh
A.N. Shulgina

at the hearing
from the plaintiff:
joint-stock company firm "SMUR"

from the defendant:
Limited Liability Company "Company" ALS and TEK "

Litvinova N.N. - representative by power of attorney dated 05/17/2018, series 36AB No. 2524556; Tatarinovich I.A. - a representative by power of attorney dated 01.01.2020 No. 11;

E.G. Puzyrev - representative by power of attorney dated 09/04/2019; Demidov I.A. - representative by proxy dated 16.12.2019
No. 27; A.V. Poretsky - representative by power of attorney dated 10.07.2020;
Vekozin V.N. - representative by power of attorney dated 03.12.2018 No. 35;

Having considered in an open court session the cassation appeal of the joint stock company firm "SMUR" against the ruling of the Nineteenth Arbitration Court of Appeal dated 05.02.2020 in case No.A14-1036 / 2017,

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 agreement for the sale of optical fibers No. 3 / 12-12 dated 09/10/2012 and a share in the right of common shared ownership of a fiber-optic communication line in the Voronezh and Saratov regions in the amount of 2 144 158 rubles 83 kopecks, due to failure to fulfill the obligation to transfer the 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 the point (optical distribution frame in the container on the territory of the RTRS "Saratov ORTPTs" at the address Saratov region, Ershov, Meliorativnaya st., 32 A) to the point (distribution coupling main MRM28 y the village of Pushkino, Sovetsky district, Saratov region); from the point (main distribution coupling MRM28 near the settlement of Pushkino, Sovetskiy district, Saratov region) to the point (optical crossover in a container on the territory of JSC "Urbakhskiy kombinat khleboproduktov" at the address Saratov region, Sovetskiy district, settlement Pushkino , 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, B. Kazachya, 6) to the point (optical crossover of LLC "Company" ALS and TEK "on the territory of JSC" Integral "at the address Saratov, Chernyshevsky st., 153); due to the lack of property subject to transfer under the contract; on the recovery of a penalty in the amount of 190,830 rubles 24 kopecks for the period from 03/21/2014 to 06/17/2014 and interest for using 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 every day refund of the prepayment cost (taking into account the clarifications accepted by the court for consideration in accordance with Article 49 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the APC RF)).

By the decision of the Arbitration Court of the Voronezh Region dated 15.10.2019, funds were recovered from LLC “Company ALS and TEK” in favor of JSC “SMUR” company (prepayment for goods under contract No. 3 / 12-12 for the sale of optical fibers and shares in the right total share ownership in a fiber-optic communication line in the Voronezh and Saratov regions, concluded on 09/10/2012) in the amount of 2

144,158 rubles 83 kopecks due to a significant violation of the terms of the contract by the seller, namely, failure to fulfill the obligation to transfer the goods - optical fibers with the identifying characteristics specified in the contract, namely 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 the point (optical distribution frame in the container on the territory of the RTRS "Saratov ORTPTS" at the address Saratov region. , Ershov, Meliorativnaya str., 32 A) to the point (distribution main coupling MRM28 near the village of Pushkino, Sovetskiy district,

Saratov region); from the point (main distribution coupling MRM28 near the settlement of Pushkino, Sovetskiy district, Saratov region) to the point (optical crossover in a container on the territory of JSC "Urbakhskiy kombinat khleboproduktov" at the address Saratov region, Sovetskiy district, settlement Pushkino , Zavodskaya st., 1A); from the point (main distribution coupling 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, B. Kazachya, 6) to the point (optical crossover 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. The court recovered 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 of a fiber-optic communication line on the territory of Voronezh and Saratov regions, concluded on 10.09.2012 in the amount of 190,830 rubles 24 kopecks for the period from 21.03.2014 to 17.06.2014. Collected 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 1,159,501 rubles 29 kopecks for the period from 01/29/2013 to 06/05/2019 and further until the day the prepaid amount is returned by the defendant. Recovered from LLC "Company" ALS and TEK "in favor of JSC" firm "SMUR" legal costs incurred to pay for the examination of the case in the amount of 1,200,000 rubles, paid under payment order No. 4144 dated September 27, 2017. Transferred to the Federal State Unitary Enterprise "Central Research Institute of Communications" from the deposit of the Arbitration Court of the Voronezh Region remuneration in the amount of 1,200,000 rubles for the forensic examination at the expense of funds contributed by the JSC

"SMUR" to the court deposit on payment order No. 4144 dated September 27, 2017. Recovered from LLC "Company" ALS and TEK "in favor of JSC" firm "SMUR" 38,537 rubles 5 kopecks of expenses for payment of the state duty. I collected from LLC “Company“ ALS and TEK ”1,935 rubles 40 kopecks of expenses for the payment of the state duty to the federal budget.

By the resolution of the Nineteenth Arbitration Court of Appeal dated 05.02.2020, the proceedings on the appeal of LLC Directorate of Communications Enterprises under Construction against the decision of the Arbitration Court of the Voronezh Region of 15.10.2019 were terminated. Court of Appeal

instance, the complaint of LLC "Company" ALS and TEK "was satisfied, the decision of the Arbitration Court of the Voronezh Region of 15.10.2019 was canceled. JSC “SMUR” refused to satisfy the claims. Collected from JSC firm "SMUR" in favor of LLC "Company" ALS and TEK "3,000 rubles of expenses for payment of the state fee for the consideration of the appeal. Returned LLC "Company" ALS and TEK "from the federal budget 3,000 rubles, paid on a payment order

No. 704779 dated 01.11.2019 for consideration of the appeal of LLC

"Directorate of communications enterprises under construction".

Disagreeing with the decision, JSC “SMUR” company filed a cassation appeal, in which it asks to cancel the decision, leaving in force the decision of the court of first instance. The Company believes that by virtue of clause

4 decisions 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. 22 and paragraph 3 of paragraph 2 of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated July 23, 2009 No. 57, judicial acts on previously accepted cases and the circumstances established in them have no prejudicial significance for the resolution of this dispute, which by the court of first instance on the basis of the case materials and evidence that 12 AAS lacked when considering case No.A57-233 / 2017, it was established not only the absence of a cable of the required brand, but also the absence of G.652 standard fibers in actually laid cables, the subject of a dispute and an expert study in case No.A14- 8464/2015 was property that does not belong to the property investigated in the present case and is not the subject of this dispute.

In the response, LLC "Company" ALS and TEK "asks to refuse to satisfy the cassation appeal, indicating that it agrees with the arguments of the court of appeal.

By the district court, the consideration of the cassation appeal was broken off by a ruling from 06/08/2020 to 07/22/2020 at 14:30.

Deputy Chairman of the Arbitration Court of the Central District Kopyryulin A.N., by decision of July 22, 2020, to consider the cassation appeal of the joint-stock company firm "SMUR" against the decision of the Nineteenth Arbitration Court of Appeal dated 05.02.2020 in case No.A14-1036 / 2017 replace judge Serokurov W.V. on the judge Kalutskikh R.G.

In view of the above, the cassation appeal is heard from the very beginning.

At the hearing on July 22, 2020, in accordance with Article 163 of the APC RF, a break was announced during the day.

The representative of LLC "Directorate of Communications Enterprises under Construction" who arrived at the hearing was not allowed to participate in the hearing, since the said company is not a person participating in the case.

Representatives of the joint stock company firm "SMUR" in the court session supported the arguments of the cassation appeal in full, asked to satisfy it, explained that the accrual of interest on

the amount recovered from 01/29/2013 is due to the defendant's failure to fulfill the obligation to transfer the disputed property for use.

Representatives of LLC "Company" ALS and TEK "in the court session asked to refuse to satisfy the cassation appeal.

Having studied the materials of the case, the arguments indicated in the complaint, responses to it, taking into account the additions presented by the parties, having heard the representatives of the parties in the case, having checked the legality of the ruling in accordance with Article 286 of the Arbitration Procedure Code of the Russian Federation, the court of cassation sees no reason to cancel the contested judicial act.

As follows from the materials of the case, LLC "Company" ALS and TEK "(company, seller, defendant) and CJSC firm" SMUR "(firm, buyer, claimant) entered into an agreement dated 04.09.2012 No. 3 / 12-12 for the 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 for 18 520 211 rubles 79

kopecks, under the terms of which
(clause 1.1) the buyer undertook to pay and take ownership, and the seller undertook to transfer the following property into the ownership of the buyer after payment:
- four optical fibers (OF) of the G.652 standard and 4/72 (four seventy-second) shares in the right of common share ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in a fiber-optic communication line Borisoglebsk - Rogachevka in the section from the M2A clutch of ORTPTs in the Tellermanovskiy settlement of the Gribanovsky district of the Voronezh region to the Ml clutch at the automatic telephone exchange of OJSC "Rostelecom" Borisoglebsk, K. Marksa, 76, with a total length of 6.8 km (subparagraph 1.1.1);
- four OV of the G.652 standard and 4/64 (four sixty-fourth) shares in the right of common share ownership of the shell, protective and power elements of the OK, couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km (subparagraph 1.1.2).
Thus, the subject of this agreement were four OVs and shares in the right of common shared ownership of two communication lines: Borisoglebsk - ORTPTS (Rogachevka, section 6.8 km from Tellermanovsky settlement to Borisoglebsk), as well as Saratov - Ozinki with a total length of 345.078 km ...
The agreement provides for a phased transfer of property from the seller to the buyer: at stage I, after the first payment of 25% for temporary use, four OVs in both communication lines along their entire length, then after the second payment, 25% into the ownership of the buyer on the basis of the acts of acceptance and transfer of property signed by the parties based on the results of making two payments, both communication lines are the first Borisoglebsk - ORTPTS Rogachevka, Tellermanovsky settlement in full, the second communication line in the Ozinki - Ershov section, that is, partially; at stage II, after the third payment of 50% in the ownership of the buyer, on the basis of the acts of acceptance and transfer of property signed by the parties, following the results of the third payment, the second communication line is transferred on the remaining section Ershov - Saratov.
As established by the courts, the obligations of the parties under the contract were partially fulfilled.
So, the plaintiff for the period from 04.10.2012 to 28.12.2012 transferred to the defendant a total of 10,926,924 rubles 96 kopecks (payment orders No. 932 dated 04.10.2012, No. 944 dated 05.10.2012, No. 782 dated 26.11.2012, No. 900 dated 07.12.2012,
No. 936 of 12.12.2012, No. 91 of 28.12.2012).
Consequently, the buyer's obligation to make the first and second payments (50%) is fully fulfilled.
At the same time, the obligation to make the third payment (50%) was fulfilled by the plaintiff only partially in the amount of 2,144,158 rubles 83 kopecks, which ZAO firm "SMUR" claimed to be collected in the present case as the amount of an advance payment under an unfulfilled contract.
In this case, the third payment under the terms of the agreement is paid by the buyer within one calendar year from the date of signing the agreement, after the first and second payments are made (subparagraph 3.7.5), that is, no later than 04.09.2013.
The defendant, as established by the court of appeal, fulfilled the obligations to transfer four OVs of the G.652 standard and the corresponding shares in the right of common shared ownership of both communication lines at stage I of the contract, that

is, fully for use and partially for ownership.
So, between the CJSC firm "SMUR" and LLC "Company ALS and TEK" on 10.10.2012 an act of acceptance and transfer of property for temporary use was signed, in accordance with which the seller transferred and the buyer accepted for temporary use the property, consisting of 4 optical fibers in a fiber-optic communication line Borisoglebsk - Rogachevka ORTPTS in Tellermanovskiy settlement and from 4 optical fibers in a fiber-optic communication line Saratov - Ozinki.
Further, on 21.11.2012 between CJSC firm "SMUR" and LLC "Company ALS and TEK" signed an act of acceptance and transfer of property into ownership according to stage 1, according to which the seller transferred and the buyer took over the property, consisting of optical fibers and a share in the right common share ownership in the fiber-optic communication line Borisoglebsk - Rogachevka ORTPTS in Tellermanovsky settlement and in the fiber-optic communication line Saratov - Ozinki of the Saratov region on the Ozinki - Ershov section.
In addition, after receiving both communication lines for use according to the act dated 10.10.2012 from the defendant, the Firm (lessor) and the KVANT-TELECOM company (lessee) entered into an agreement dated 23.11.2012 No. 23 for a period from 23.11.2012 to 22.11.2015 -A4732 / 12 lease of a share in the right of common share ownership of fiber-optic communication lines along their entire length.
The parties to the lease agreement signed the Optical Fibers Transfer and Acceptance Act.
02/06/2013 the equipment that was leased from JSC "QUANT-TELECOM" under an agreement with the plaintiff was turned off by the defendant.

In accordance with subparagraph 4.2 of the sale and purchase agreement between the plaintiff and the defendant, in case of violation of the deadlines for the transfer of property through the fault of the seller for more than 90 (ninety) calendar days, the buyer has the right to unilaterally and out of court refuse to execute this agreement. In this case, the Seller is obliged, within 30 (thirty) calendar days from the date of receipt of the notification from the buyer, to return to the buyer the previously transferred funds paid for the non-transferred property.

If the refund is delayed for more than 10 days, the Buyer has the right to decide to collect a penalty from the Seller in the amount of 0.1% for each day of delay, while the total amount of the penalty cannot exceed 10% of the amount owed.

On the other hand, in clause 4.4 of the contract, the parties agreed that in case of violation of the terms of payment for the property through the fault of the buyer for more than 90 calendar days, the seller has the right to unilaterally and out of court to refuse to execute this contract or to claim the unpaid amounts in court.

The seller company on 02/04/2013 notified the company about the termination of the contract dated 09/04/2012 No. 3 / 12-12 due to repeated violation by the buyer of contractual obligations to pay the third payment.

The buyer firm, for its part, in response to the said notification (letter No. 278 dated 02/11/2013) referred to the lack of legal grounds for ALS and TEK Company LLC to terminate the contract unilaterally. At the same time, CJSC firm "SMUR" suspended the fulfillment of its obligations to pay the third payment in the amount of 50% percent of the value of the property provided for in clause 3.7.5 of the agreement dated 04.09.2012 No. 3 / 12-12, referring to the admitted by LLC "Company ALS and TEK »Material violations of the terms of the said agreement.

So, the Firm, referring to the fact that it revealed a discrepancy between the identifying features of the acquired property and the features specified in the statement of transferred property and in the act of transfer and acceptance of 10.10.2012 (claims of 25.02.2013, of 17.10.2013, of 10.02.2014 from requirements to eliminate the violations).

In notification No. 226 dated January 27, 2014, CJSC firm "SMUR" announced its cancellation of the contract dated 04.09.2012 No. 3 / 12-12 and demanded from LLC "Company ALS and TEK" to return to the buyer the money paid for the property transferred under this agreement , in the amount of 10 926 924 rubles 96 kopecks.

In turn, LLC "Company ALS and TEK", pointing out repeated and gross violations by CJSC firm "SMUR" of the terms of the contract dated 04.09.2012 No. 3 / 12-12, by letter No. 841 dated 23.05.2014 asked CJSC firm

"SMUR" shall consider the specified agreement terminated.

The issue of termination between the parties to the agreement dated 04.09.2012 No. 3 / 12-12 is considered by the Arbitration Court of the Voronezh Region in case No. A14-

8464/2015, as well as the issue of recognizing the contract as null and void - in case No.

At the hearing, the representatives of the parties confirmed the fact of termination of the contract out of court no later than May 2014, however, they believe that the grounds for its termination were different for the Buyer and the Seller.

Within the framework of case No.A14-2754 / 2014, the Firm's claim to recover from the Company unjust enrichment in the amount of 2,144,158 rubles 83 kopecks, fulfilled in terms of the terminated agreement, and a counterclaim for the recovery of illegally obtained income were considered. By a court decision of November 24, 2015, both the initial and counterclaims were denied. On June 21, 2016, the court of appeal accepted the Firm's refusal from the claims, the proceedings in the case were terminated in this part, and the rest of the decision was left unchanged.

In case No.A14-13744 / 2015, the Firm's claim to the Company to invalidate the 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 was considered dated 10.09.2012 regarding the alienation to the buyer of 4 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 FOCL "Saratov-Ozinki"; the application of the consequences of the invalidity of a void transaction in the form of an obligation on the defendant to return to the plaintiff the money paid under this agreement in the amount of 10,504,601 rubles 95 kopecks. By a court decision dated 09/01/2016, the claim was denied. The decision of the court of appeal accepted the refusal of the JSC firm "SMUR" from the claim, the proceedings were terminated.

In case No. A57-233 / 2017, the Company's claims to the Firm to the buyer about the obligation to return (reclaim from someone else's illegal possession) the disputed property received under the act dated 10.10.2012 were considered. By the decision of the court of appeal dated 12/13/2017, the seller's claims were fully

satisfied.

In case No.A14-8464 / 2015, the Firm's claims against the Company to the seller were considered to terminate the contract dated 09/10/2012 in part II of stage and to collect advance payment for the goods due to its non-compliance with technical requirements. By the decision of the court of appeal dated 09/14/2018, the claims were completely denied due to the failure to establish significant violations of the contract by the Seller.

Satisfying the requirements of the Buyer's Firm to collect 2,144,158 rubles 83 kopecks, that is, part of the third payment, forfeit under clause 4.2 of the contract and interest for the use of other people's funds from 01/29/2013, the court of first instance concluded that the Seller did not fulfill the obligation to transfer the goods due to his absence, which the plaintiff became aware of when he got acquainted on 11/05/2015 with case No.A14-2754 / 14, which received evidence from

Administration of the Soviet, Ershovsky, Engels and Fedorovsky districts of the Saratov region, which is confirmed by a copy of the request

No. 3247/15 of 10/19/2015 JSC firm "SMUR" on familiarization with the case materials, as well as in the process of considering the case No. A57-18378 / 2013, where evidence of the absence of property in kind was presented - an expert opinion of 12/02/2015 , in which the use of cables of various brands was established during the construction of the site

"Saratov-Ershov", as well as the absence of unpainted module No. 1 in these cables. In addition, the first-instance court referred to the results of the forensic examination carried out at the request of the plaintiff in the present case.

Canceling the decision of the court of first instance, the court of appeal concluded that the obligation of the seller's company to transfer the ownership of the communication line to the plaintiff under stage II did not come due to the plaintiff's failure to make the third payment in full. The circumstances of the company's execution of the contract for the transfer of all property provided for by the contract for the use of the plaintiff under the act of 10.10.2012, the subsequent reclamation of this property from the buyer's firm have already been investigated and established by the courts as part of the consideration of the above cases, including No.A14-8464 / 2015, A57- 233/2017; the courts established the actual use of the property by the plaintiff for its intended purpose, including four OVs on the Ershov-Saratov communication line. In this regard, the court of appeal came to the conclusion that the grounds for the stated requirements did not correspond to the factual circumstances of the case and the norms of law.

Disagreeing with the resolution, JSC firm "SMUR" filed a cassation appeal.

The District Court rejects the appeal, taking into account the following.

By virtue of paragraph 1 of Article 454 of the Civil Code of the Russian Federation (hereinafter referred to as 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 for it a certain amount of money (price).

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 purchase and sale agreement.

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 RF).

From the moment of exercising the right to claim for the refund of the prepayment amount, the party that made this claim is considered to have lost interest in the further execution of the terms of the contract, and the contract
- ceased to be valid, to which the attention of the courts was drawn in the ruling of the Supreme Court of the Russian Federation of 05/31/2018 in the case
No. 309-ES17-21840.
Thus, as correctly noted by the court of appeal, a buyer demanding 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 goods by the seller, as well as the fact that the contract of sale by the time of realization of the demand to return the purchase price has not terminated its action on other grounds. On the basis of paragraph 3 of Article 405 of the Civil Code of the Russian Federation, the debtor is not considered overdue until the obligation can be fulfilled 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 obligations, 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 the number completely dependent on the will of one of the parties.
In this case, the subject of the dispute is essentially the recovery of the part of the third payment, prepaid by the plaintiff, of 2,144,158 rubles 83 kopecks associated with the transfer of ownership of a part of the property that is the subject of the contract.
At the same time, as correctly indicated by the court of appeal by the terms of the agreement (clauses 3.7.5 -3.7.6), the parties made the obligation to transfer disputed optical fibers to be made a third payment in the amount of 9 260 105 rubles 90 kopecks, which is paid by the buyer within one calendar year from the moment 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.
The plaintiff's arguments that the seller on 01/29/2013 violated the obligation to transfer the property provided for in the contract for use after the first payment, since the seller does not have the property specified in the contract, which the buyer became aware of

at the end of 2015, the buyer was suspended in January 2013 year fulfillment of its payment obligations, is subject to rejection as not based on the factual circumstances of the case.

The effective resolution of the Twelfth Arbitration Court of Appeal dated 12/13/2017 in case No.A57-233 / 2017 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 06/17/2014, 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, as 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.

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 entered into legal force are not proven again when the arbitration court is considering 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 the case

No. A57-233 / 2017, the circumstances established by a court act in this case that entered into legal force have prejudicial significance for them when considering this dispute.

The referral of the facts to the established judicial act that has entered into legal force means that the persons participating in the case have no right to dispute and refute such facts in order to replace the previously made

conclusions to the opposite. The property of the irrefutability of a judicial act in

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 APC RF).

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 procedures, it can be shaken if any new or newly discovered circumstance or found fundamental violations undeniably testify to a miscarriage of justice, without which the competent court cannot compensate for the damage caused (decisions of 11.05.2005 No. -P, dated 05.02.2007 No. 2-P and dated 17.03.2009 No. 5-P, ruling dated 15.01.2008 No. 193-O-P) ruling of the Twelfth Arbitration Court of Appeal dated 13.12.2017 on the case

No. A57-233 / 2017 has not been 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, and cannot be refuted by means of new evidence presented by the defendant or obtained during forensic examination of the case.

Reference of the submitter of the complaint to the provisions of paragraph 3 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-fulfillment or improper fulfillment of contractual obligations" according to which, the courts should also bear in mind that regardless of the composition of the persons participating in the case for the collection under the contract and in the case for the claim for challenging contract, the assessment given by the court to the circumstances that are established in the case considered earlier, is taken into account by the court considering the second case. In the event that the court considering the second case comes to different conclusions, it must indicate the relevant reasons, it is subject to rejection, since in the present case the claim to challenge the contract is not declared.

Reference of the cassation appeal to 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 the case, in which a court of general jurisdiction or an arbitration court issued an appropriate court decision, are entitled when considering another civil cases 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.

In addition, 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 by the buyer within the specified time, or other circumstances provided for 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 cancel the contract, returning the advance paid earlier within thirty calendar days from the date of sending the notification of refusal to the buyer (clause 4.4 of the contract).

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

From the foregoing, it follows that by the time of filing a claim for the refund of the advance payment, the controversial agreement terminated due to the fault of the buyer.

Thus, the court of cassation considers that the plaintiff has not proven the occurrence of 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. In this regard, the court of appeal lawfully and reasonably refused to satisfy the claims stated on the grounds set out.

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 of termination of the contract through the fault of the buyer and the return of the advance paid, were not declared by the plaintiff,

Satisfaction of the claim with reference to factual circumstances that differ from those indicated by the plaintiff when applying to the arbitration court would entail the court going beyond the scope of the claim, despite the dispositiveness and adversarial nature of the judicial process (Articles 4, 9, 41, 49 of the Arbitration Procedure Code of the Russian Federation).

There are no grounds for re-evaluating the conclusion of the court of appeal, the factual circumstances established by it and the evidence in the case at the court of cassation by virtue of Article 286 of the APC RF.

The arguments of the applicant of the cassation appeal are subject to rejection, since they do not refute the conclusions of the courts, are aimed at re-evaluating the

circumstances established by them and the evidence available in the case, were the subject of their consideration and they were given a proper legal assessment.

Violations of the norms of procedural law, which, by virtue of part 4 of Article 288 of the Arbitration Procedure Code of the Russian Federation, are grounds for canceling the contested judicial acts, were not revealed by the cassation court.

Guided by clause 1 of part 1 of Article 287, Article 289 of the Arbitration Procedure Code of the Russian Federation,

sentenced:

The resolution of the Nineteenth Arbitration Court of Appeal dated 05.02.2020 on case No.A14-1036 / 2017 shall be left unchanged, the cassation complaints were dismissed.

The decision may be appealed to the Judicial Collegium of the Supreme Court of the Russian Federation within a period not exceeding two months from the date of its adoption, in accordance with the procedure provided for in Art. 291.1 of the Arbitration Procedure Code of the Russian Federation.

Presiding V.AND. Smirnov

Judges R.G. Kalutskikh

A.N. Shulgina