

Freedom of Contract and the Currency Clause: Will the New Practice of Amending Contracts with Currency Clauses Take Root?

Newsletter

5 February 2016

The Moscow Arbitrazh Court has rendered a judgment amending a lease contract with a currency clause in favour of the lessee relying on the prohibition of abuse of freedom of contract. The full text of the judgment in Case No. A40-232605/2015 was published on 4 February 2016.

The Court's main argument was that the lessor acted in bad faith in using its position for receiving super-profit from the soaring US Dollar exchange rate. The judgment contains a reference to the Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation "On Freedom of Contract and Its Limits".

Mosgo & Partners draws your attention to the fact that as of the date of this Newsletter, the judgment **has not yet entered into force** and is pending appeal.

1. THE ESSENCE OF THE DISPUTE

The lessee (mobile network operator, VimpelCom) filed an action with the Moscow Arbitrazh Court against PJSC Tizpribor, seeking to terminate or amend the contract for lease of non-residential premises.

In support of its claims, the lessee stated that the lease contract made in 2008 contained a mechanism of calculating the rent tied to the US Dollar. After the exchange rate more than doubled in 2014 and 2015, the lessee asked the lessor to change the rate by providing for an exchange rate band (from 30 to 42 roubles per US Dollar), but the latter refused to do so.

Subsequently, the lessee submitted to court seeking termination of the contract or amending it to read as follows:

If the exchange rate of the Russian Rouble to US Dollar set forth by the Russian Central Bank is less than thirty (30) Roubles per US Dollar on the date of payment, the payment shall be made at the rate of thirty (30) Roubles per US Dollar. If the exchange rate of the Russian Rouble to US Dollar set forth by the Russian Central Bank exceeds forty-two (42) Roubles per US Dollar on the date of payment, the payment shall be made at the rate of forty-two (42) Roubles per US Dollar.

2. THE COURT JUDGMENT

VimpelCom's claim to amend the contract was granted by the Court fully in accordance with the claimant's proposal (to provide for the exchange rate band from 30 to 42 roubles per US Dollar).

At the same time, the Court dismissed the claim for termination of contract, elaborating the reasons for its decision. In particular, the Court held that changes in the currency exchange rate should not serve as sufficient grounds for termination.

3. REASONS FOR THE JUDGMENT

In providing the reasons for its decision to grant the claim for amending the contract, the Court has noted, first, that the parties are generally free to determine the terms and conditions of their contract. In the contract in question, the parties have agreed upon pegging the rent to the US Dollar. However, referring Art. 450(2)(2) of the Russian Civil Code, the Court has observed that the contract may be amended by a court at the request of one of the parties.

The Court explained the need to amend the contract in the case at hand by invoking Article 1(4) of the Russian Civil Code, pursuant to which **no one shall derive profit from their own bad faith conduct**, and para. 8 of the Resolution of the Supreme Arbitrazh Court of the Russian Federation "On Freedom of Contract and Its Limits", which allows courts to grant additional remedies to a litigating party, if **they establish that the other party acted in bad faith**.

According to the Court, when rent significantly exceeds the market rent, or falls to be significantly lower than the market rent, there may be a substantial unjust enrichment or saving. The Court noted that expert opinions had confirmed that the rent exceeded its market levels. At the same time, the parties refused to engage experts in court.

In substantiating its judgment as regards the 30 to 42 rouble exchange rate band, the Court observed that it upheld it **since no alternative was proposed by the defendant**.

4. OPINION

Specialists differ in their views regarding the judgment. Please be reminded that it is pending appeal, has not entered into force and may be revised by higher courts. The recent court practice uniformly upheld contract terms and conditions despite the currency fluctuations. Courts usually justified their judgments by business risks and the freedom of contract (*i.e.*, since the parties themselves have opted for tying their contract to a foreign currency, they shall bear the risk of changes in its exchange rate towards the rouble).

Notwithstanding the foregoing, we believe that this judgment demonstrates that courts are ready not only to render "template" judgments, but to examine the details and circumstances of specific disputes. The judgment under review is one of the few, if not the only judgment to revise a lease contract with a currency clause, and in any event is a good

sign for claimants: **namely, if they properly support their claims to amend contracts, courts will analyse such claims.**

We are unable to comment on whether the judgment is correct since we do not have access to the case files.

Nevertheless, it would seem that the very possibility of revising rent where the lessor obtains additional and disproportionate profit therefrom, is acceptable. The need to keep the parties' interests in balance may require that in specific exceptional cases the principle of freedom of contract shall be subject to the principle of fairness.

At the same time, if the lessor is able to explain the need to tie the rent to a foreign currency not only by inflation risks, but also, for instance, by having other obligations in foreign currency, we believe that since in such a situation the lessor will have no additional profit, its conduct cannot be qualified as bad faith conduct, and therefore the court will have no reason to interfere with the contract.

Mosgo & Partners will be monitoring the positions the higher courts will take in this Case.



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