



STATE COMMERCIAL ('ARBITRATION') COURT FOR THE MOSCOW CIRCUIT: PARTIES MAY SET A SPECIAL PROCEDURE FOR EXERCISING THEIR RIGHT TO WITHDRAW FROM A CONTRACT

FAO heads of companies' legal departments

Law firm Pepeliaev Group advises that Commercial Court for the Moscow Circuit has issued a decision in which it upheld the argument of Thomson Reuters (Markets) SA, a client of Pepeliaev Group, that the provisions of a fee-based contract for information services were lawful and bound the customer when stipulating that the contract terminated 12 months after the customer gave notice of its withdrawal from the contract.

Background

The Bank and Thomson Reuters (Markets) SA concluded a contract for services, which stipulated a special procedure for withdrawing from the contract. The parties made provision for a special termination procedure under which the consequences of a unilateral withdrawal from the contract would be that the contract would remain in effect for twelve months after the service of notice of withdrawal. Despite the above, the Bank filed a lawsuit with the court in which it argued that, based on the rules of article 782 of the Civil Code, the contract terminated from the date stated in the notice to the service provider of withdrawal.

The court of first instance issued a decision under which the contract should have been terminated from the date when the counterparty received the notice of withdrawal. The court of appeal upheld that decision, while the court of cassation held that these arguments were incorrect and changed the decision of the first instance court. The court of cassation held that the provisions corresponded to the law and should be applied to the relationship of the parties to the contract when such provisions introduced a 12-month period after the notice of withdrawal from the contract was served on the customer during which the contract was deemed to be remain in effect.

A contract discontinues on the date when a notification of termination is received, unless the contract provides otherwise.

Before the reform of the general part of the Civil Code relating to the law of obligations (i.e. before 1 June 2015), civil legislation did not provide for any special rules on the procedure for terminating a contract by unilaterally withdrawing from it. At the same time, the right to unilaterally withdraw from a contract was stipulated by a general rule (article 310 of the Civil Code) and in provisions regarding certain types of contracts.

In 2015, article 450.1 was introduced into the Russian Civil Code. It contained a rule that an authorised party may exercise the right to unilaterally withdraw from a contract by notifying the other party of withdrawal from the contract (performance of it). A contract discontinues on the date when this notification is received, unless the contract provides otherwise. In other words, the law itself or the contract may set another date on which the contract is terminated or discontinued.

The court of cassation upheld the arguments of Thomson Reuters (Markets) SA, that a contract, even concluded before the reform of the Civil Code, may contain special consequences for unilateral withdrawal from a fee-based contract. Unilateral withdrawal from a contract the performance of which is connected with the parties carrying out entrepreneurial activity may be made conditional on the need to pay out a particular amount to the other party or on compensating losses in full upon withdrawal from the contract. Moreover, the Court stressed that a contract may provide for other consequences of unilateral withdrawal. In case of this specific dispute, such consequence may be that the contract is in effect for a certain period after the notice is received of unilateral withdrawal from the contract.

Consequently, contracting parties, being commercial undertakings with neither party enjoying evident advantages over the other, may stipulate a different regime for determining the consequences of withdrawal from a fee-based contract which does not contravene the rules of the Russian Civil Code and does not upset the balance of interests of the parties.



The condition in dispute does not restrict the right of the parties to withdraw from the contract unilaterally. It only stipulates the consequences of such withdrawal.

Article 782 of the Civil Code is not a strictly imperative rule

As a legal ground, in its statement of claim the Bank cited article 782 of the Civil Code (being wrong in believing that the provision is strictly imperative), which enables each party to a contract to unilaterally withdraw from a fee-based contract without stating any reason, with the only consequence being that the withdrawing party has to reimburse to the service provider its actually incurred expenses.

The first instance court and the court of appeal also proceeded on the imperative nature of article 782 of the Civil Code. However, the position of Pepeliaev Group and of the Defendant was that the provisions of article 782 of the Civil Code regarding the right of the customer to terminate a fee-based contract for services by claiming unilateral withdrawal apply only when the contract does not provide for any other consequences of unilateral withdrawal from the contract.

The court of cassation upheld the arguments of Pepeliaev Group and held that the arguments of the first instance court and of the court of appeal regarding the imperative nature of article 782 of the Civil Code were incorrect. The reasoning was that, in the opinion of the panel of judges, there is a prohibition on contracting to cancel or modify a customer's right to withdraw from a fee-based contract for services only in consumer transactions made with individuals, or in transactions in which one party 'is in a position of strength'.

Consequently, based on the above legal position, we may conclude that parties to the transaction and the legal nature of their relationships should be taken into consideration in each particular case.



Resolution No. 16 of the Plenum of the Russian Supreme Commercial ('Arbitration') Court dated 14 March 2014 explains that provisions of article 782 of the Russian Civil Code that grant to each party to a fee-based services contract a right for unilaterally withdraw from the contract without giving reasons [...] do not rule out a possibility for the parties to the contract to agree another procedure for establishing the consequences of withdrawal from the contract (for example, full compensation of losses in case of withdrawal from the contract either by service provider or by the client). Equally, nor does it rule out an agreement of the parties to establish a procedure for withdrawal from a fee-based services contract (in particular, unilateral withdrawal by a party to an agreement that is connected with entrepreneurial activities of both parties to it may require that a certain sum be paid to the other party).

In addition, Resolution No. 16 of the Plenum of the Russian Supreme Commercial ('Arbitration') Court dated 14 March 2014 explains that a statutory provision should be treated as discretionary if: (i) such statutory provision does not contain an express prohibition on the parties to a contract agreeing to set a different condition from that set by the statutory provision; and (ii) no criteria exist for such statutory provision to be binding (for example, when the purposes of statutory regulation require this in order to protect interests that are particularly significant and protected by law, or to prevent a gross disruption of the balance of the parties' interests, or if the binding nature of the provision stems from the nature of the statutory regulation of contracts of this type).

What to think about and what to do

When concluding new contracts companies should pay attention to the grounds, procedure and consequences of unilateral withdrawal of the contract, and, especially importantly, whether the contract provides for specific consequences of such unilateral withdrawal and how these consequences are worded. When the parties have a common clear understanding of the provisions of the contract and the legal nature of such provisions, this will help them to avoid ungrounded claims and the corresponding lawsuits.

Help from your adviser

The professionals of Pepeliaev Group's dispute resolution and mediation practice are ready to provide multifaceted support on issues related to litigation in state commercial courts and courts of general jurisdiction at all levels.

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