

# LEASE WITHOUT CONTROVERSY

## Newsletter

The much debated decision of the Commercial Court of the City of Moscow in the case of "VimpelCom" versus "Tizpribor" on amendment of the lease agreement has been overturned by the court of appeals. Consequently, the court has refused to recognise the depreciation of the rouble as legal grounds for amending the amount of a lease payment.

On 1 February 2016 the Commercial Court of the City of Moscow adopted an unprecedented decision in this case, recognising the depreciation of the rouble as sufficient grounds for forced introduction of amendments to a lease agreement containing a foreign currency clause (fixing of the lease payment in US dollars, with settlements to be made in roubles at the exchange rate on the date of payment). The court introduced the corresponding amendments, setting the maximum and minimum amounts of the US dollar exchange rate for the lease payment.

Despite having established the lack of grounds for termination or amendment of the agreement in connection with a significant change in circumstances (based on Article 451 of the RF Civil Code), the court nevertheless satisfied the claimant's demand to introduce amendments to the agreement, citing the fact that the lease payment under the agreement was significantly higher than "the standard rates paid to lease similar premises in the given location", thereby leading to unjust enrichment of the lessor. The court also deemed that the actions of the lessor, which refused to fix the exchange rate of the US dollar to the rouble, amounted to misconduct (abuse of a right).

The Ninth Commercial Court of Appeals concluded that there were no grounds for introducing amendments to the lease agreement, and overturned the decision of the lower court. Among other things, the court of appeals indicated the following:

A change in foreign currency exchange rates does not represent the significantly altered circumstance with which the law associates the appearance of the right to amend a lease agreement through the courts.

The contractual terms stipulating the possibility to reconsider the amount of the lease payment is subject to the principle of freedom of contract (Art. 421 of the RF Civil Code), "which assumes the agreement, without any coercion, of autonomous expressions of will of the contracting parties to a transaction acting in their own interests to amend the obligations".

Moreover, the court of appeals did not recognise the fact of the abuse of a right by the lessor, emphasising that the refusal to reconsider the amount of the lease payment does not attest to any abuse, and that in this case what is in question is the performance of the contractual terms agreed upon by the parties.

The court of appeals went on to deem invalid the conclusions of the court of first instance on the possible appearance of unjust enrichment in the form of lease payments that are higher than market lease rates, since the parties' legal relations are regulated by the norms of the law of obligations, and arise from the effective lease agreement. Accordingly, no unjust enrichment appears.

The courts had previously held to the position that a financial and economic crisis, as well as changes to the monetary and currency policies of the RF Government and the RF Central Bank, are not a significant change in circumstances and do not give grounds to demand the termination (or amendment) of an agreement, and that the assumption of the risk of a change in the exchange rate of a foreign currency to the rouble is a voluntary business risk of the parties to the agreement.

Therefore, the approach that had formed in court practice over the course of many years remained firm.

The judgment of the Ninth Commercial Court of Appeal may be appealed in the cassation instance within two months of the date of the entry of the judgment into legal force. We will keep you up to date!



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<sup>1</sup> Ruling of the Ninth Commercial Court of Appeals No. 09AP-8243/2016-GK dated 29 March 2016 in case No. A40-83845/15.

<sup>2</sup> Based on Clause 1 of Article 1102 of the RF Civil Code, property may be considered to have been obtained or retained unjustly only in those cases when it was received without the grounds stipulated for this by the law or the transaction.



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