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PRELIMINARY CONTRACT IN STRUCTURING REAL ESTATE TRANSACTIONS

(CURRENT LEGAL POSITIONS OF THE PRESIDIUM OF THE RF SUPREME ARBITRATION COURT)

Ruling of the Presidium of the RF Supreme Arbitration Court No. 13585/12 dated February 12, 2013

Ruling of the Presidium of the RF Supreme Arbitration Court No. 9798/12 dated 1/15/2013

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On April 24, 2013, two Rulings of the Presidium of the RF Supreme Arbitration Court were published, giving a legal qualification to the relations of the parties arising from a preliminary contract. It is not the first time the Presidium has addressed this issue (see, for example: Ruling No. 3056/07, dated July 17, 2007, No. 402/09, dated July 14, 2009, No. 13331/09 dated January 19, 2010), however, we would not say that the institution of preliminary agreements frequently becomes an object of attention of a supreme court jurisdiction.

Fulfilling the obligations of executing the main contract may be enforced with a penalty. In that case, the penalty for refusal to execute the main contract is not payable in cases when the main agreement is made on the basis of a court resolution

In Case No. A43-25969/2011, the subject of the conflict was the preliminary contract under which the parties had agreed to make the main contract of purchase and sale of a non-residential building in Nizhniy Novgorod within two years. The parties provided a penalty of RUB 10 million for the seller's refusal to make the main contract.

Despite the fact that the buyer addressed the seller a number of times suggesting that the main contract be made (with draft attached) during the period set by the preliminary contract, it was never executed. Consequently, the buyer went to court seeking to compel the seller to make the purchase and sale agreement. Per resolution of the arbitration court of Nizhniy Novgorod region, dated January 24, 2011, case No. A43-24532/2009, the buyer's request was satisfied, and on April 25, 2011, the parties made the purchase and sale contract, and on May 19, 2011, the building was handed over to the buyer.

Nevertheless, referring to the seller's refusal to voluntarily make the main contract, the buyer turned to court seeking a penalty of RUB 10 million to be paid thereto. Per resolution of the initial jurisdiction court, the penalty was made payable, but its amount reduced per Art. 333 of the RF Civil Code, to RUB 3.5 million. The appeal resolution voided the resolution of the initial jurisdiction court, and the claim was dismissed. The Federal Arbitration Court of Volga-Vyatka district left the resolution of the court of appeal unchanged.

The Presidium of the Supreme Arbitration Court pointed out that civil law contains no norms that would preclude the parties from applying penalty for the purpose of ensuring that the responsibilities provided by the preliminary contract be fulfilled. The possibility to collect penalty for failure to perform on a responsibility from the faulty party is also provided by Art. 394 of the Civil Code. Therefore, the condition related to penalty for failure to perform on the obligation to execute the main contract may be included in the preliminary contract.

Along with that, the Presidium made a conclusion that, under the conditions of the preliminary contract, the penalty was set by the parties solely for the case when the main contract was not executed, either voluntarily or upon court resolution (failure), for the purposes of compensating to the buyer possible losses (the court accounted for the amount of the penalty, which was over 7 times the amount of the cost of the sold building). As the result, based on court resolution, the main purchase and sale contract was made by the parties, meaning that the preliminary agreement was fulfilled; therefore, the Presidium of the Supreme Arbitration Court agreed with the conclusions made by the courts of the appeal and cassation appeal jurisdictions, on the absence of grounds for collecting from the seller the penalty provided by the preliminary contract.

Money paid by the future lessee under the preliminary contract during the period when the facility was used for decoration shall is not returnable as unjust enrichment, even when the main lease contract was never executed.

In case No. A33-18187/2011 courts saw quite a standard structure of a contractual relationship during lease of facilities in a building under construction (before Resolution No. 13 by the Plenum of the SAC of the RF dated January 25, 2013 was accepted, the parties to such relationships, as a rule, would make a preliminary lease contract at the stage of construction, and later - a short term and a long term contract; however, the facilities would be transferred to the lessee for decoration even before the main lease contract was made).

In the case in question, the parties were bound by the terms and conditions of the preliminary contract to make the main contract on leasing a non-dwelling facility. Before registering the right of ownership and making the main contract, the developer, under the preliminary contract, transferred the facilities to the future lessee for decoration, and the lessee, under the preliminary contract, paid to the lessor a fee for using the facility during the stated period. In the end, the main lease contract was never executed, and the might-have-been lessee turned to court claiming to return the money that it had paid for using the facility, as unjust enrichment.

The Presidium of the SAC of the RF, in its Ruling No. 9798/12 dated January 15, 2013, stated that the subject of the preliminary contract are the parties' responsibilities to make the main contract in future, due to which the preliminary contract cannot set any other obligations for the parties, including the obligation to transfer property or to make payments for use thereof (this is precisely grounds for the conclusion made in Ruling No. 13331/09 by the Presidium of the SAC of the RF, dated January 19, 2010, that the advance cannot be used as a way to secure fulfillment of obligations under a preliminary contract).

Along with that, the Presidium made a conclusion that the preliminary lease contract, which, in addition to the obligation to make the main contract, stipulates the future lessor's obligations to transfer the facility to the lessee for decoration, is a mixed contract (par. 3, Art. 421 of the Civil Code of the Russian Federation).

The Presidium of the SAC of the RF highlighted that the current civil legislation contains no norms that would allow for transferring facilities in a non-commissioned building for decoration and renovation (a similar explanation is contained in Ruling no. 13 by the Plenum of the SAC of the RF dated January 25, 2013). The obligation set by the contract for the future lessee to pay for the period when it would hold in possession the facilities does not contradict the law. As, setting disputable conditions of the contract, including the payment condition, the parties clearly based it on the fact that those conditions are in their interests and the obligation of one party to transfer the facility to the counterparty's possession to perform the required works corresponds to the counteragent's obligation to make payment for that, such payment is not returnable as unjust enrichment in case the main contract is never made.

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